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No. _____

In The
# Supreme Court of the United States

PETER G. GRAIN, M.D., and ANNETTE BARNES, M.D.,
*Petitioners,*

v.

TRINITY HEALTH, MERCY HEALTH SERVICES, INC., d/b/a MERCY HOSPITAL-PORT HURON, and MARY R. TRIMMER,
*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does a federal district court have the authority pursuant to *Wilko v. Swan*, 346 U.S. 427 (1953) overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), to modify an arbitration award based upon the "manifest disregard of the law" standard when the arbitrators, in a restricted submission, do not apply the particular law for resolving the dispute specified by the parties in their pre-dispute arbitration agreement?

## LIST OF PARTIES

The parties are listed in the caption.

## CORPORATE DISCLOSURE STATEMENT

Petitioners Peter G. Grain, M.D., and Annette Barnes, M.D., are individuals.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Grain v. Trinity Health, Mercy Health Services, Inc.*, 551 F.3d 374 (6th Cir. 2008). The Sixth Circuit affirmed the February 14, 2008 decision of the United States District Court for the Eastern District of Michigan, reported at 2008 WL 441060 (E.D. Mich. Feb 14, 2008). The District Court denied Petitioners' motion for reconsideration in an opinion and order on April 11, 2008. See Appendices A-C.

## STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the district court's order denying Petitioners' motion to correct or modify the arbitration award was issued on December 24, 2008. A timely petition for a rehearing en banc was denied by the Sixth Circuit on February 25, 2009. See Appendix D. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Federal Arbitration Act, 9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or

> refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Federal Arbitration Act, 9 U.S.C. § 11:

> In either of the following cases the United States court in and for the district wherein the award was made may make an offer modifying or correcting the award upon the application of any party to the arbitration –
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

## STATEMENT OF THE CASE

The present case involves an important issue regarding the nature and scope of judicial review of an

arbitration award in a "restricted submission" arising under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. The submission was restricted by the parties' arbitration agreement providing that the dispute "shall be governed by the laws of the State of Michigan." (J.A. 65). The arbitration agreement also provided that "[t]he prevailing party shall be awarded his/its costs including actual attorney fees . . ." (J.A. 61). At the close of the arbitration proceedings, the Panel determined that Petitioner Dr. Peter Grain, an African-American neurosurgeon, was the prevailing party. Notwithstanding, in calculating the costs, attorney fees and interest awarded to Dr. Grain, the Arbitration Panel, exceeding its authority under the parties' arbitration agreement, did not apply the well-established Michigan law of contract damages. Accordingly, Petitioners moved the District Court to correct or modify the Arbitration Award in this respect on the basis that the Arbitration Panel manifestly disregarded controlling Michigan law.

The District Court, however, denied Petitioners' motion to correct or modify the Award as to the costs, attorney fees and interest awarded to Dr. Grain. In pertinent part, the District Court found "manifest disregard of the law" may only be "a basis for *vacating* an arbitration award," not for the modification of an arbitration award. (Appendix B, 16a). In denying Petitioners' motion for reconsideration, the District Court also stated that, pursuant to Sixth Circuit precedent, "[a] court's power to *modify* an arbitration award is confined to the grounds specified in § 11 [of the FAA]." (Appendix C, 23a) (citing *NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995)) (emphasis in original). Agreeing with the District Court, the Sixth Circuit affirmed the order, holding

that "*NCR* remains the law of this circuit and prohibits modifying an award based on an alleged 'manifest disregard' of law." (Appendix A, 11a). The Sixth Circuit denied Petitioners' petition for en banc rehearing on February 25, 2009. (Appendix D).

The Sixth Circuit's decision undermines the parties' autonomous common-law contractual rights to determine the law binding the Panel concerning the resolution of their dispute through the arbitration process. Specifically, it is contrary to *Wilko v. Swan,* 346 U.S. 427 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Express Inc.,* 490 U.S. 477 (1989), and longstanding case law subsisting alongside the FAA, which has recognized judicial review of arbitration awards under the manifest disregard of the law standard. The Sixth Circuit's decision also creates a split with other circuits, particularly the Second Circuit, which recognizes the manifest disregard of the law standard as a proper ground for modifying an arbitral award.

## I. The Arbitration Proceedings

This case arises from Respondent Mercy Hospital's breach of an Income Guarantee Agreement ("IGA") with Petitioner Dr. Peter Grain in June 1998 (at the earliest) or January 28, 1999 (at the latest), and Respondents' wrongful conduct in compelling Dr. Grain to sign a Release rescinding the IGA.[1] The

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[1] As stated by the District Court in its August 11, 2004 opinion, Respondent Mercy recruited Dr. Grain to its service area in Port Huron, Michigan, and the parties entered into an IGA with an arbitration provision. (J.A. 153). Subsequently, Respondents threatened not to renew Dr. Grain's hospital privileges, which

parties' arbitration agreement is set forth at Paragraph 4 of the IGA, which provides in pertinent part:

> 4. Dispute Resolution. Any disputes involving the interpretation, breach or enforcement of this Agreement which cannot be resolved by the Hospital and Physician shall be resolved by binding arbitration in accordance with the rules of the American Arbitration Association. The prevailing party shall be awarded his/its costs including actual attorney fees. . . . (J.A. 61)

Paragraph 13 of the IGA specifies the law governing the IGA:

> 13. Governing Law. The validity and interpretation of the Agreement shall be governed by the laws of the State of Michigan. (J.A. 65)

In an order issued on August 11, 2004, the District Court granted Respondents' motion to compel arbitration of the parties' dispute. (J.A. 106-111). The Demand for Arbitration was filed on October 28, 2004. The arbitration proceedings commenced on September 11, 2006 and concluded on May 24, 2007 after forty-five hearing days. On December 22, 2007, the Panel entered an Award against the Respondents, jointly and

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would have effectively ended his career as a neurosurgeon, if he did not sign a Release. (J.A. 153). Confronted with this pressure, Dr. Grain signed a Release on February 2, 1999, and his privileges were extended. (J.A. 153-154). On June 26, 2003, Petitioners filed a sixteen-count Verified Complaint, including a race discrimination under 42 U.S.C. § 1981. (J.A. 18-56).

severally. (J.A. 194-231). Specifically, the Panel found that (i) the Respondents forced Dr. Grain to sign the Release under duress, and (ii) that their conduct was overreaching and wrongful. Accordingly, the Panel rescinded the Release and awarded Dr. Grain damages for Respondent Mercy Hospital's breach of contract in the amount of $518,625, attorneys' fees of $1,145,294.35, costs of $490,476.20, less Respondents' attorneys' fees and costs of $512,525.11 for a net Award of $1,641,870.44, plus interest on the contract damages from October 28, 2004, the date of the Demand for Arbitration. The Panel rejected Dr. Grain's claims of misrepresentation and civil extortion.

## II. The Panel's Determination Of The Costs, Attorney Fees And Interest Awarded To Dr. Grain As The Prevailing Party In The Arbitration Proceedings Was Manifestly Contrary To Well-Established Michigan Statutory And Case Law.

Although the Panel found that Respondents' wrongful conduct interfered with Dr. Grain's contract with Mercy Hospital and that Mercy Hospital breached the contract with Dr. Grain, the Panel manifestly disregarded applicable Michigan statutory and case law in three ways when calculating the costs, attorneys' fees and interest awarded to Dr. Grain.

First, the Panel manifestly disregarded well-settled Michigan law of damages when it awarded interest on Dr. Grain's contract damages in the amount of $518,625.00 only from the date of the Demand for Arbitration (October 28, 2004) until the satisfaction of the judgment (January 30, 2008). (J.A. 214-216). As a result, the Panel did not award any interest on the

contract damages portion of the Arbitration Award for the "gap period" running from the date of the breach of contract (June 1998 or January 28, 1999) until the date of the Demand for Arbitration (October 28, 2004).[2] Pursuant to clearly established Michigan law of damages, the Panel was required to calculate interest on Dr. Grain's contract damages in the amount of $518,625.00 for the "gap period" running from the date of the breach of contract (June 1998 or January 28, 1999) until the date of the Demand for Arbitration (October 28, 2004).

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[2] Michigan recognizes a distinction between (1) common-law or judicially-determined interest as an element of damages and (2) statutorily determined interest on a money judgment in a civil action. *Gordon Sel-Way, Inc. v. Spence Bros.*, 475 N.W.2d 704, 711 n. 9 (Mich. 1991). Both forms of interest are intended to compensate the plaintiff for loss of the use of funds. Common-law or judicially determined interest is considered an element of damages, awardable in contract actions from the date of the breach. *McCreery v. Green*, 38 Mich. 172, 185 (1878); *Snow v. Nowlin*, 5 N.W. 443, 445 (Mich. 1880); Hon. P. McMillen, 2 *Michigan Law of Damages and Other Remedies* (3rd ed.) (ICLE, 2008), *Interest*, § 28.8. Michigan also recognizes a statutory form of interest on a money judgment. Specifically, Michigan Compiled Laws (M.C.L.) § 600.6013 provides for interest on a "money judgment recovered in a civil action." Accordingly, common-law interest on the contract damages awarded to Dr. Grain had to be calculated from the date that Mercy Hospital breached the IGA with Dr. Grain (either June 1998 or January 28, 1999) until the date the Arbitration Award was satisfied (January 30, 2008). The Panel was also required by the judgment interest statute to calculate interest from the date the complaint was filed (June 26, 2003) until the satisfaction of the judgment. See *R.D. Mgmt. Corp. v. Philadelphia Indem. Ins. Co.*, 302 F.Supp.2d 728, 737-38 (E.D. Mich. 2004).

Second, because clear and controlling Michigan law (statutory, case law and public policy) treats costs and attorneys' fees as contract damages, the Panel was required to calculate the interest on costs and attorneys' fees in the amount of $1,635,770.55 running from the date of the breach of contract (June 1998 or January 28, 1999) until the satisfaction of the judgment.[3] However, the Panel manifestly disregarded Michigan law and public policy in this respect when it did not award any interest on Dr. Grain's costs and attorneys' fees from the date of the breach of contract and/or the date of the filing of the complaint until the satisfaction of the judgment.

Third, under well-established Michigan contract law, Dr. Grain was the "prevailing party" in the arbitration proceedings.[4] Consequently, Dr. Grain was

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[3] Under Michigan law, attorney fees are recoverable as an element of damages if provided for by contract. *Nemeth v. Abonmarche Dev., Inc.*, 576 N.W.2d 641, 652 n. 13 (Mich. 1998). Attorney fees awardable under a contractual provision are considered damages, not costs. *Fleet Bus. Credit, LLC v. Krapohl Ford Lincoln Mercury Co.*, 735 N.W.2d 644, 647 (Mich. Ct. App. 2007); M. Kalmink, 2 *Michigan Law of Damages and Other Remedies* (3rd ed) (ICLE, 2008), *Attorney Fees*, § 29.2. In addition, under M.C.L. 600.6013(1)-(8), interest is awardable on costs and attorney fees as an element of contract damages. See *Everett v. Nikola*, 599 N.W.2d 732, 735-736 (Mich. Ct. App. 1999).

[4] Pursuant to the plain and ordinary meaning of "prevailing party" as found in the contract, the Panel was compelled by controlling Michigan law to award Dr. Grain all his costs and actual attorneys' fees as the prevailing party in the arbitration proceedings. See *Forest City Enters., Inc. v. Leemon Oil Co.*, 577 N.W.2d 150, 161-162 (Mich. Ct. App. 1998); *H.J. Tucker & Assocs., Inc. v. Allied Chucker and Eng'g Co*, 595 N.W.2d 176, 182 (Mich. Ct. App. 1999) (quoting *Van Zanten v. H. Vander Laan Co., Inc.*,

entitled to all his costs and actual attorneys' fees, as provided by the plain and unambiguous language of Paragraph 4 of the IGA.[5] Moreover, the Panel manifestly disregarded Michigan law and public policy by ruling that Dr. Grain was only entitled to 75% of his costs and attorneys' fees and that he was responsible for 25% of Respondents' costs and attorneys' fees. (J.A. 214-216).[6] Consequently, the

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503 N.W.2d 713, 714 (Mich. Ct. App. 1993)); see also *South Davison Cmty. Center, Inc. v. Township of Davison*, No. 232346, 2002 WL 31421770, at *4 n. 6 (Mich. Ct. App. Oct. 25, 2002) (noting that "[t]he United States Supreme Court recently defined a 'prevailing party' as one who has received a favorable judgment on the merits of his claim or an enforceable consent judgment; either of which create the necessary 'material alteration of the parties' legal relationship'") (quoting *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't. of Health & Human Res.*, 532 U.S. 598, 603-604 (2001)).

[5] The Panel paid no heed to the clear and unambiguous language of the contractual provision that "[t]he prevailing party" is entitled to his/its actual attorneys' fees when it found that Dr. Grain was not entitled to his "actual attorney fees" on the ground that his attorneys' fees were "excessive." The Panel based this clearly erroneous ruling upon Michigan Rule of Professional Conduct (M.R.P.C.) 1.5 presumably on the ground that his attorneys' fees were "in excess of a 'reasonable fee.'"(J.A. 210). M.R.P.C. 1.5, however, does not apply when there is a contractual provision that clearly and unambiguously provides for the recovery of "actual attorney fees." See *Cargas v. Bednarsh*, No. 239421, 2003 WL 21716463, at *1 (Mich. Ct. App. July 24, 2003) (citing *Mahnick v. Bell Co*, 662 N.W.2d 830, 832-833 (Mich. Ct. App. 2003)).

[6] The Panel found that Dr. Grain failed to prevail on his misrepresentation claim, which the Panel concluded was unrelated to his claims of rescission and breach of contract. (J.A. 155-163). As a result, the Panel reduced Dr. Grain's award of his costs and attorneys' fees by 25% and charged him with 25% of

Panel manifestly erred by subtracting $545,256.00 in costs and attorneys' fees from Dr. Grain's total damages award; by failing to calculate interest on the costs and attorneys' fees as contract damages in the amount of $545,256.00 running from the date of the breach of contract and/or the date of the filing of the complaint until the satisfaction of the judgment; by requiring Dr. Grain to pay Respondents' costs and attorneys' fees in the amount of $512,525; and by failing to calculate interest on the costs and attorneys' fees as contract damages in the amount of $512,525.00 running from the date of the breach of contract and/or the date of the filing of the complaint until the satisfaction of the judgment.

## III. The District Court Denied Petitioners' Motion To Modify The Award On The Ground That The Manifest Disregard Of The Law Standard Does Not Apply To Modify An Arbitration Award.

In response to the Panel's manifest disregard of the law in calculating the Award with respect to the costs, attorney fees and interest awarded to Dr. Grain as the

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Respondents' costs and attorneys' fees. There was, however, no rational basis in Michigan law for the Panel to award Dr. Grain only 75% of his costs and attorneys' fees and make him responsible for 25% of Respondents' costs and attorneys' fees when he was prevailing party in the arbitration proceedings. Moreover, as a matter of collateral estoppel and/or res judicata, the Panel was bound by the District Court's determination that Dr. Grain's misrepresentation claim arose out of the same core of facts as his claims for rescission and breach of contract. *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto., Aerospace & Agric. Implement Workers, UAW*, 97 F.3d 155, 160-161 (6th Cir. 1996).

prevailing party in the arbitration proceeding, Petitioners moved the District Court on December 22, 2007 to confirm the Panel's decision on liability and contract damages, but to correct or modify the Award as to the calculation of the costs, attorneys' fees and interest due to Dr. Grain. (J.A. 172-231). On February 14, 2008, the District Court issued an opinion and order granting Petitioners' motion to confirm the Award as to damages and liability, but denying Petitioners' motion to modify the Award as to the costs, attorneys' fees and interest awarded to Dr. Grain. (Appendix B). In pertinent part, the District Court reasoned that it had no authority to modify an award for a "manifest disregard of the law," and that it could only vacate the award under that standard. (Appendix B, 16a-17a).

Petitioners then moved the District Court under Fed. R. Civ. P. 59(e) to reconsider its decision on the grounds that case law of the Sixth Circuit, and other federal case law, allows for the modification of an arbitration award for "manifest disregard of the law." (J.A. 417-686). On April 11, 2008, the District Court entered an opinion and order denying Petitioners' motion for reconsideration. (Appendix C). In pertinent part, the District Court observed that, under Sixth Circuit precedent, "[a] court's power to *modify* an arbitration award *is confined to* the grounds specified in § 11." (Appendix C, 23a)(citing *NCR Corp., supra.*, 43 F.3d at 1080) (second emphasis added in original).

## IV. The Sixth Circuit Affirmed The District Court's Order On The Ground That The Manifest Disregard Of The Law Standard Does Not Apply To Modify An Arbitration Award.

In an opinion issued for publication on December 24, 2008, the Sixth Circuit affirmed the District Court's order denying Petitioners' motion to adjust the Award as to the costs, attorneys' fees and interest awarded to Dr. Grain as the prevailing party in the arbitration proceedings. (Appendix A). In pertinent part, the Sixth Circuit held that its decision in *NCR Corp.* "remains the law of this circuit and prohibits modifying an [arbitration] award based on an alleged 'manifest disregard' of law." (Appendix A, 11a).

## REASONS FOR GRANTING THE PETITION

Whether a federal district court may modify an arbitration award based upon the "manifest disregard of the law" standard when arbitrators set aside the parties' pre-dispute arbitration agreement requiring the application of a particular law is a question of paramount importance arising under the FAA, 9 U.S.C. § 1 *et seq*. It is a question that was left open by this Court's decision in *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). In rejecting the parties' post-dispute arbitration agreement in that case providing for "a private expansion by contract" of the statutory grounds set forth in the FAA for the vacation or modification of an arbitration award, *Hall Street* did not address whether an arbitration award, in a submission restricted by a pre-dispute arbitration agreement mandating the application of a particular law, may be modified on the basis of the manifest

disregard of the law or the nature and scope of that standard. Thus, this Court's guidance is urgently needed on this issue since the circuit courts are deeply split as to whether a court may modify an arbitration award based upon the manifest disregard of the law standard. Further, in view of the increasing importance of arbitration as a preferred mode of dispute resolution in this country, as recently reflected by this Court's decision in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), it is jurisprudentially necessary to subject arbitration awards to judicial review under the manifest disregard of the law standard in order to ensure the protection of important rights, particularly federal civil rights, in the arbitral forum.

In concluding that § 10 and § 11 of the FAA provide the exclusive regime for judicial review of an arbitration award, the majority in *Hall Street* acknowledged that "the FAA is not the only way into court for parties wanting review of arbitration awards." 128 S. Ct. at 1406. Among the non-statutory ways, the majority in *Hall Street* indicated that parties may seek judicial review based upon their common-law rights under contract law. The present case seeks review upon this ground. Specifically, Petitioners contend that, apart from statutory criteria specified at § 11 of the FAA, a court may modify an arbitration award for the manifest disregard of the law when arbitrators in a "restricted submission" defy the express terms of the parties' pre-dispute arbitration agreement mandating the application of the state law governing their dispute.

## I. REVIEW IS NECESSARY TO ENFORCE THE PARTIES' COMMON-LAW CONTRACTUAL RIGHTS TO ARBITRATE THEIR DISPUTE IN ACCORDANCE WITH WELL-ESTABLISHED MICHIGAN LAW, SUBJECT TO JUDICIAL REVIEW BASED UPON THE MANIFEST DISREGARD OF THE LAW STANDARD.

At the root of this action is the common-law principle of party autonomy to enter into an agreement to determine the legal rules governing the resolution of a dispute through arbitration.[7] From this principle flows the legal consequence that the parties' agreement in the present action to arbitrate their dispute in accordance with well-settled Michigan law is subject to judicial review under the manifest disregard of the law standard.

Section 2 of the FAA provides that a written agreement to arbitrate any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The "preeminent concern" of Congress in enacting the FAA was "the enforcement . . . of privately negotiated arbitration agreements." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219, 221 (1985). It was to place such

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[7] See Kirgis, *The Contractarian Model of Arbitration and its Implications for Judicial Review of Arbitral Awards*, 85 Or. L. Rev. 1 (2006); Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 Duke L.J. 547 (2005); Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39 (1999); Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703 (1999).

agreements "upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1980)(quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)(quoting H.R. Rep. No. 96, 68th Cong., Ist Sess., 1, 2 (1924)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Thus, the federal policy is to ensure the enforcement of parties' private agreements to arbitrate in accordance with the terms of these agreements. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (noting that "as with any other contract, the parties' intentions control"); *Volt, supra*. 489 U.S. at 478 ("It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.").

### A. The Panel Was Bound By The Parties' Arbitration Agreement To Calculate The Costs, Attorney Fees And Interest Awarded To Dr. Grain In Accordance With Well-Established Michigan Law.

Because arbitration is strictly a matter of contract, parties to an arbitration agreement are at liberty to choose the particular substantive law that governs the resolution of their dispute. *Mastrobuono v. Shearson Lehnman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (noting that "parties are generally free to structure their arbitration agreements as they see fit") (quoting *Volt, supra.*, 489 U.S. at 479). In light of the broad purpose of the FAA to enforce arbitration agreements as written, it thus defies the legitimate expectations of the parties if arbitrators decide a dispute in a manner that egregiously departs from the established legal principles agreed upon by the parties to govern their

dispute. Based upon this principle, the parties to the present action should not be bound by the Panel's manifestly erroneous rulings that clearly depart from well-established principles of Michigan law governing their dispute, and the Award should be modified accordingly.[8]

In this case, under the IGA, the parties agreed that any contractual dispute "***shall*** be governed by the laws of the State of Michigan." (J.A. 65) (emphasis added). Notwithstanding the clear terms of the parties' contract, the Panel set aside the parties' bargained-for expectations to resolve their dispute in accordance with well-settled Michigan law of contract damages when it calculated the costs, attorney fees and interest awarded to Dr. Grain as the prevailing party in the arbitration proceedings. Exceeding the powers provided by the parties' arbitration agreement, the Panel calculated the costs, attorney fees and interest in accordance with its own unknown version of the law. However, as a matter of the common-law of contracts and agency, the Panel was not free to determine the dispute between the parties without applying the well-established Michigan law of contract damages in calculating the costs, attorney fees and

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[8] As indicated by its history and structure, the FAA was intended to enforce party autonomy by effectuating private agreements to arbitrate. However, the paramount interests of private autonomy and the public interest in fostering private agreements to arbitrate are thwarted when arbitrators are allowed to operate arbitrarily and capriciously, unchecked by judicial review. Thus, judicial review of arbitration agreements under the manifest disregard of the law standard is vital to ensure that arbitrators effectuate the parties' contractual agreement to arbitrate based upon the parties' own terms.

interest awarded to Dr. Grain.[9] Consequently, the Panel's decision in this respect should not bind the parties, nor be enforceable under § 2 of the FAA.

### B. The Manifest Disregard Of The Law Standard Stated In *Wilko* Reflects Longstanding Common Law Predating The Enactment Of The FAA.

In *Wilko*, *supra.*, 346 U.S. at 436-437, this Court introduced the "manifest disregard" language against a backdrop of well-established arbitration law and practice. See also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (reaffirming the existence of the manifest disregard test).[10] Specifically, in *Wilko*, this Court stated: "in ***unrestricted*** submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in federal courts, to judicial review for

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[9] See *George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (citing *Eastern Associated Coal v. United Mine Workers*, 531 U.S. 57, 62 (2000); *E.I. DuPont de Nemours & Co. v. Grasselli Employees Ind. Ass'n of E. Chicago, Inc.*, 790 F.2d 611, 619 (7th Cir. 1986) (Easterbrook, J. concurring); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 Mich. L. Rev. 1137, 1140 (1977).

[10] For a lucid analysis of the federal and state case law pre-existing the enactment of the FAA and the *Wilko* decision, see Gaitis, *Unraveling the mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 Pepp. Disp. Resol. L.J. 1 (2007).

error in interpretation."(Emphasis added.)[11] Under *Wilko*, then, the manifest disregard of the law standard applies with even greater force in a ***restricted*** submission requiring the application of a particular law as mandated by the parties' arbitration agreement.[12] Thus, when an arbitration proceeding is governed by a "restricted submission" mandating that arbitrators apply a particular law, the resulting arbitration award should be subject to modification by

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[11] Footnote 24 in *Wilko* attached to this passage cites to *Burchell v. Marsh*, 58 U.S. 344 (1854), *United States v. Farragut*, 89 U.S. 406 (1874), *Kleine v. Catara*, 14 F.Cas. 732 (1814), *Texas & P. Ry. Co. v. St. Louis Southwestern Ry. Co.*, 158 F.2d 251, 256 (8th Cir. 1946); *The Hartbridge (North England S.S. Co. v. Munson S.S. Line)*, 62 F.2d 72, 73 (2d Cir. 1932), *Mutual Benefit Health & Health & Acc. Ass'n v. United Cas. C.*, 142 F.2d 390, 393 (1st Cir. 1944), and Note, *Judicial Review of Arbitration Awards on the Merits*, 63 Harv. L. Rev. 681, 685 (1950).

[12] Under *Wilko* and predecessor case law, submissions to arbitrators may be restricted or unrestricted. As explained by Justice Story in *Kleine, supra.*, 14 F.Cas. at 735:

> If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission; they may restrain or enlarge its operation as they please. If no such reservation is made in the submission, the parties are presumed to agree, that every thing, both as to law and fact, which is necessary to the ultimate decision, is included in the authority of the referees.

Unlike an unrestricted submission, a restricted submission limits the arbitrators' authority in some respect.

a reviewing court for a manifest disregard of the law when the arbitrators clearly fail to apply that law.[13]

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[13] *Wilko* and the predecessor case law effectively stand for the proposition that when a submission is restricted by the parties' arbitration agreement so as to compel arbitrators to apply a particular law in resolving the dispute, the parties are contractually entitled to have the chosen law so applied, and the arbitrators are obligated to apply the law in that manner. Further, this Court's formulation of the manifest disregard of the law standard in *Wilko* subsists alongside the FAA. See McNeil, *American Arbitration Law* at 104 (1992) ("Sections [10 and 11] constitute limitations on the basic principle enunciated in section 2 in the form of specified grounds for vacation and modification of arbitral awards. They do not, however, constitute a significant departure from common law or statutory arbitration as it existed before modern arbitration statutes."). Thus, at § 11, the FAA states: "The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties." Finally, there is no indication that the Congress, in enacting the FAA, intended to displace the common-law basis for reviewing an arbitration award in a restricted submission based upon a manifest mistake or error in the application of the law governing the parties' dispute. See *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 315, n. 8 (1981) ("[T]he question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law"). See also Gaitis, *supra*. note 10, at 57-58; Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brook. L. Rev. 471, 518 (1998).

## II. REVIEW IS WARRANTED TO RESOLVE A CIRCUIT CONFLICT CONCERNING THE MODIFICATION OF ARBITRATION AWARDS BASED UPON THE MANIFEST DISREGARD OF THE LAW STANDARD.

### A. The Sixth Circuit Inconsistently Applies The Manifest Disregard Of The Law Standard To Vacate But Not Modify Arbitration Awards.

In accord with virtually every circuit court, the Sixth Circuit has recognized the manifest disregard of the law standard as a non-statutory ground for vacating arbitration awards.[14] Specifically, in *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Jaros,* 70 F.3d 418, 421 (6th Cir. 1995), the Sixth Circuit, relying upon *Wilko*, found that arbitrators manifestly disregard the law if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2)

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[14] With one exception, every circuit court has followed *Wilko* by recognizing some version of the "manifest disregard of the law" standard. *See Prudential-Bache Sec., Inc. v. Tanner,* 72 F.3d 234 (1st Cir. 1995); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.,* 103 F.3d 9 (2d Cir. 1997); *United Transp. Union Local 1589 v. Suburban Transit Corp.,* 51 F.3d 376 (3d Cir. 1995); *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31,* 933 F.2d 225 (4th Cir.1991); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395-396 (5th Cir. 2003); *Lee v. Chica,* 983 F.2d 883 (8th Cir. 1993); *Barnes v. Logan,* 122 F.3d 820 (9th Cir. 1997); *Jenkins v. Prudential-Bache Sec., Inc.,* 847 F.2d 631 (10th Cir. 1988); *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456 (11th Cir. 1997); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175 (D.C. Cir. 1991). The only exception is the Seventh Circuit. See *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

the arbitrators refused to heed that legal principle."[15] While the Sixth Circuit recognizes that the manifest disregard of the law standard applies to vacate an arbitration award, it nonetheless denies that arbitration awards may be modified on this ground. In so doing, the Sixth Circuit offers no principled basis for this demarcation, simply declaring in *NCR Corp.* that "[a] court's power to *modify* an arbitration award is confined to the grounds specified in § 11." 43 F.3d at 1080 (emphasis in original).[16]

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[15] In *Jaros*, the Sixth Circuit made it abundantly clear that "a blatant disregard of the applicable rule of law will not be tolerated." *Id.* at 421; see also *Dewahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) ("Thus, to find manifest disregard a court must find two things: the relevant law must be clearly defined and the arbitrator must have consciously chosen not to apply it.").

[16] Petitioners contend that judicial review of arbitration awards based upon the manifest disregard of the law standard is not an all or nothing affair under the FAA. Indeed, the manifest disregard of the law standard logically applies to the modification of an arbitration award, which is nothing more than the partial vacation of an award. Even the Sixth Circuit in *NCR Corp.* recognizes this point, noting that "[v]acating an award "in-part" . . . is synonymous with modifying an award." *Id.* at 1080. Thus, pursuant to the principle that the greater power contains the lesser, *NCR Corp.* warrants the conclusion that the modification of an arbitral award should be subject to judicial review under the manifest disregard of the law standard, See *O'Connell v. Shalala*, 79 F.3d 170, 177 (1st Cir. 1996) (citing *United States v. O'Neil*, 11 F.3d 292, 296 (1st Cir. 1993)) (describing this principle as "a bit of common sense that has been recognized in virtually every legal code from time immemorial").

### B. The Second Circuit Recognizes The Manifest Disregard Of The Law Standard As A Non-Statutory Basis For Modifying Arbitration Awards.

The Sixth Circuit's decision also creates an unnecessary circuit split since the leading circuit court reviewing arbitration awards – the Second Circuit – recognizes the manifest disregard of the law as a judicially-created ground for modifying an arbitration award. See *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998). This circuit split occurs despite the fact that both the Sixth Circuit and Second Circuit define the manifest disregard of the law standard in similar terms.[17]

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[17] In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986), the Second Circuit, relying upon *Wilko*, defined the manifest disregard of the law standard as follows:

> The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. . . . To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an Panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it.

## III. REVIEW IS NEEDED BECAUSE THIS CASE IS THE PERFECT VEHICLE TO RECOGNIZE JUDICIAL REVIEW OF ARBITRATION AWARDS BASED UPON THE MANIFEST DISREGARD OF THE LAW STANDARD AS CONSISTENT WITH THE NATIONAL POLICY FAVORING ARBITRATION.

Judicial review of the arbitration award in this case based upon the Panel's manifest disregard of the law is fully consistent with the national policy favoring arbitration since it is necessary to preserve the parties' contractual expectations to have their dispute decided in accordance with the particular law that the parties themselves have chosen. *Hall Street, supra.*, 128 S. Ct. at 1405. Moreover, in seeking to modify the Award, Petitioners are not asking this Court to "open[] the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . . and bring arbitration theory to grief in the post-arbitration process." *Id.* (quoting *Kyocera Corp. v. Prudential-Bache Trade Serv.*, 341 F.3d 987, 998 (9th Cir. 2003)). Because the proper adjustments in the Award will not engender a cumbersome or time-consuming process, reversal of the Sixth Circuit's decision affirming the District Court's order denying Petitioners' motion to modify the Award on the basis of the Panel's manifest disregard of Michigan law is

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At least one other circuit court has explicitly recognized the manifest disregard of the law standard applies to the modification of an arbitration award. See *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001).

fully consistent with the current "national policy favoring arbitration with . . . limited review." *Hall Street, supra.*, 128 S. Ct. at 1405.

## CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 08-1410**

**[Filed December 24, 2008]**

| | |
|---|---|
| PETER G. GRAIN, M.D., and ANNETTE BARNES, M.D., *Plaintiffs-Appellants*, | ) |
| v. | ) |
| TRINITY HEALTH, MERCY HEALTH SERVICES INC., d/b/a Mercy Hospital, and MARY R. TRIMMER, *Defendants-Appellees*. | ) |

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 03-72486—Patrick J. Duggan, District Judge.

Submitted: December 12, 2008

Decided and Filed: December 24, 2008

Before: ROGERS, SUTTON and McKEAGUE, Circuit Judges.

## COUNSEL

**ON BRIEF:** Elmer L. Roller, LAW OFFICE OF ELMER L. ROLLER, Bloomfield Hills, Michigan, Gary P. Supanich, LAW OFFICE, Ann Arbor, Michigan, for Appellants. W. Mack Faison, Richard Joseph Seryak, MILLER, CANFIELD, PADDOCK & STONE, Detroit, Michigan, Linda O. Goldberg, MILLER, CANFIELD, PADDOCK & STONE, Ann Arbor, Michigan, for Appellees.

## OPINION

SUTTON, Circuit Judge. Peter Grain and Annette Barnes challenge the district court's denial of their motion to confirm in part and modify in part a $1.6 million arbitration award. We affirm.

### I.

Grain and Barnes, husband and wife, are medical doctors who once worked for Mercy Hospital. In 2003, they sued Mercy and the related defendants for taking a variety of "punitive actions" that allegedly interfered with their medical practices. JA 41. Grain complained that the defendants had violated 42 U.S.C. § 1981 by discriminating on the basis of race in contracting and by violating several state laws, while Barnes sought only state-law relief. After the defendants moved to compel arbitration, the district court dismissed the state-law claims that were subject to a pre-existing arbitration agreement and stayed the remaining claims pending arbitration.

Grain and Barnes prevailed in the arbitration proceeding and won $1,641,870.44. They then filed a

motion in the district court, asking the court to confirm the merits of the arbitration decision and to increase the size of the award. The district court confirmed the award but refused to increase it. *Grain v. Trinity Health* (*Grain I*), No. 03-72486, 2008 WL 441060, at *3 (E.D. Mich. Feb. 14, 2008). After a failed motion to reconsider, *see Grain v. Trinity Health* (*Grain II*), No. 03-72486, 2008 WL 1742718, at *3 (E.D. Mich. April 11, 2008), Grain and Barnes appealed.

II.

The parties agree that we have jurisdiction over this appeal. But because the parties to a lawsuit cannot by consent create appellate jurisdiction that does not otherwise exist, we must determine for ourselves whether we have authority to resolve this appeal. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

The traditional ground for appellate jurisdiction—the final-judgment rule, 28 U.S.C. § 1291—does not give us authority to decide this appeal. Although the district court has done everything that can be done with respect to the arbitration and although it dismissed the other claims subject to the arbitration agreement, it retains jurisdiction over, and indeed continues to consider, the non-arbitrable claims filed by Grain and Barnes. Section 1291 generally does not permit piecemeal appeals but only permits an appeal once there is nothing left to do but enter the judgment and enforce it. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Nor do the general exceptions to the final-judgment rule appear to apply here. The district court did not enter a Rule-54(b) certification,

which permits a court to "dispose[] of one or more but fewer than all of the claims or parties in a multi-claim/multi-party action," *Brotherton v. Cleveland*, 173 F.3d 552, 559 (6th Cir. 1999) (emphasis omitted), and which at any rate may not apply to interlocutory arbitration decisions, *see Perera v. Siegel Trading Co.*, 951 F.2d 780, 786 (7th Cir. 1992). No party relies on § 1292(b) as a basis for jurisdiction. And the collateral-order doctrine—which is frequently invoked but rarely invoked successfully, *see, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)—does not apply because the propriety of the district court's confirmation order would not be "effectively unreviewable on appeal from a final judgment" after the remaining matters are resolved below. *United States v. Parrett*, 530 F.3d 422, 427 (6th Cir. 2008).

All of these rules, however, deal with general grounds for declining to adhere to the final-judgment rule established by § 1291. They do not preclude Congress from granting specific jurisdiction over appeals arising under certain federal laws, even appeals that do not resolve the rest of the claims pending in the district court. *See Livesay*, 437 U.S. at 474; *Moglia v. P. Employees Ins.* Co., 547 F.3d 835, 837 (7th Cir. 2008); see *also In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983); *accord* 16 Wright, Miller & Cooper, *Fed. Prac. & Proc.* § 3926.2. *See generally* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. Pitt. L. Rev. 717, 729–36 (1993) (collecting statutory exceptions to the final-judgment rule of § 1291).

One such grant of specific appellate jurisdiction appears in the Federal Arbitration Act. *See Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 799 (7th Cir. 2005). Congress has empowered the courts of appeals to entertain a variety of appeals from interlocutory and final district-court arbitration decisions, including "[a]n appeal . . . from . . . an order . . . confirming . . . an award." 9 U.S.C. § 16(a)(1)(D). This appeal falls within this grant of appellate authority.

Grain and Barnes filed this action under the Federal Arbitration Act, seeking to confirm the arbitrators' decision in part (by upholding their liability ruling) and seeking to modify the arbitrators' decision in part (by increasing the award from $1.6 million to roughly $3.2 million). Although the Act permits a district court to grant both forms of relief, 9 U.S.C. §§ 9, 10, the court in this instance granted just one of them: It granted the couple's request to confirm the liability ruling but denied their request to modify the damages award. All of this resulted in a district-court order "confirming . . . an award," which is precisely what § 16(a)(1)(D) permits a disappointed party, even a *partly* disappointed party, to appeal. Nothing about this provision of the Act, or anything else in the Act, indicates that a party to a district-court proceeding under the Act must challenge all of a district court's confirmation decision, as opposed to just some of it, in order to file an appeal. The Act, it is true, directly authorizes appeals from district-court orders that "modify[]" arbitration awards, 9 U.S.C. § 16(a)(1)(E), and yet does not directly say that an unsuccessful party may appeal an "unmodified" award or a "denied modification request." But this is of no moment because an "unmodified" award frequently

will become a "confirm[ed]" award, as indeed happened here. Jurisdiction exists to review the district court's decision.

III.

In attempting to vacate or modify an arbitration award governed by the Federal Arbitration Act, a disappointed party must look to sections 10 and 11 of Title 9, which "provide [the] exclusive regime[] for the review provided by the [Federal Arbitration Act]." *Hall St. Assocs. v. Mattel, Inc.*, __ U.S. __, 128 S. Ct. 1396, 1406 (2008). Section 10 enumerates several grounds for vacating an award, while section 11 does the same for modifying an award. As the arbitration winners, Grain and Barnes, unsurprisingly, do not seek to vacate the award under § 10. They instead wish to modify the award—in truth, to double it—and thus rely on § 11, which provides the following grounds for modifying an arbitration award:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

A.

Grain and Barnes claim that the award must be modified because there was "an evident material miscalculation of figures." 9 U.S.C. § 11(a). But because they failed to raise this argument in the district court, they have forfeited the argument on appeal. *See Enertech Elec., Inc. v. Mahoning County Comm'rs*, 85 F.3d 257, 261 (6th Cir. 1996). The argument, at any rate, has nothing to recommend it. By its terms, "an evident . . . miscalculation of figures" concerns a computational error in determining the total amount of an award—what the Fourth Circuit calls a "mathematical error appear[ing] on the face of the award." *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 194 (4th Cir. 1998); *see also Capital Wholesale Elec., Inc. v. McCarthy Constr.*, No. 93-16578, 1995 WL 105987, at *2 (9th Cir. Mar. 9, 1995) (requiring an "evident *mathematical* miscalculation") (emphasis added); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (finding a material miscalculation when an arbitrator mistakenly awarded the same damages twice in the same award). No such error appears on the face of the award, and Grain and Barnes have not pointed to any such error. Instead of complaining that the arbitrators made an obvious numerical gaffe in computing the total award, Grain and Barnes argue that the arbitrators made a mistake on the merits when they refereed a dispute between the parties over the appropriate start and stop dates for calculating the interest award. Whatever else such an alleged error may be, it is not "an evident material miscalculation of figures."

B.

Grain and Barnes face a similar problem in contending that the award was "imperfect in matter of form not affecting the merits of the controversy," 9 U.S.C. § 11(c), on the theory that it did not include a sufficient amount of attorneys' fees. Here, too, we have a complaint about a merits dispute, and here, too, we have a provision that deals with a process-driven problem. An award that is "imperfect in matter of form," as these terms suggest, is one that suffers from a scrivener's error or that otherwise does not deliver on the arbitrator's stated purpose in granting relief. *See Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1284 (5th Cir. 1994); *see also Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (describing the type of errors affected by this subsection as "technical error[s]"); *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980) (holding that district court had no power to revise arbitration award amount for violating public policy because "Section 11(c) . . . does not license the district court to substitute its judgment for that of the arbitrators"); *cf. Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10, 15 (D. Mass. 2002) (modifying an award when the arbitrators' written decision did not reflect the award they orally announced due to a "simple mistake" in the completion of a form).

Grain and Barnes cite no case—and we can locate none—in which the outcome of an arbitrator's reasoned decision regarding the appropriate amount of an attorneys' fees award is viewed as a "matter of form." The one case on which they rely in this portion of their argument cuts against them. It held that an

award of attorneys' fees was "*not* imperfect in matter of form with respect to the adjudication of attorney's fees [because] [t]he issue of attorney's fees was presented to the arbitrator, and he made a clear determination of the parties' rights to attorney's fees under [the arbitration agreement]." *Mantaline Corp. v. PPG Indus., Inc.*, No. 2:02CV269, 2006 WL 297263, at *5 (W.D. Pa. Feb. 7, 2006) (emphasis added) (internal quotation marks omitted). Exactly. Because Grain and Barnes have not shown that this aspect of the award was inconsistent with the arbitrators' merits ruling on attorneys' fees, § 11(c) provides no basis for relief.

C.

Grain and Barnes principally argue that their award should be doubled, not because it implicates one of the enumerated grounds for modifying an award, but because it turned on a "manifest disregard of the law." This theory, however, appears nowhere in § 11, and the Supreme Court has recently explained that the enumerated grounds in §§ 10 and 11 provide the "exclusive" grounds for obtaining relief from an arbitration decision. *Hall St.*, 128 S. Ct. at 1406. To the extent that "manifest disregard" is "shorthand" for the grounds enumerated in § 11, as the Supreme Court suggested might be the case for some of the grounds listed in § 10, *id.* at 1404, that does Grain and Barnes no good. As we have shown, the enumerated grounds upon which they rely simply do not apply to their merits-based complaints about the award.

It is true that we have said that "manifest disregard of the law" may supply a basis for *vacating* an award, at times suggesting that such review is a

"judicially created" supplement to the enumerated forms of FAA relief. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995). *Hall Street*'s reference to the "exclusive" statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory. But, either way, we have used the "manifest disregard" standard only to vacate arbitration awards, not to modify them. As we held in *NCR Corp. v. Sac-Co, Inc.*, "[a] court's power to *modify* an arbitration award is confined to the grounds specified in [FAA] § 11," 43 F.3d 1076, 1080 (6th Cir. 1995), which do not include "manifest disregard of law." *See* Thomas H. Oehmke, *Commercial Arbitration* § 132:1 (2008); *cf. Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509–11 (2001) (noting that, in the labor-arbitration context, neither procedural misconduct nor irrational findings by an arbitrator will justify a court's reformation of the arbitration of the award because the appropriate remedy in both situations is to remand the case for further arbitration).

Grain and Barnes claim that we have repudiated the holding of *NCR*, but that is an overstatement. The two cited cases deal only with a court's power to vacate awards based on the "manifest disregard" standard, and neither one contains even a kernel of dicta supporting this theory. *See Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000); *Jaros*, 70 F.3d at 421. Other cases, it is true, do contain dicta suggesting that a reviewing court may vacate *or modify* an arbitration award based on manifest disregard. But nothing turned on these casual remarks. In two cases, we noted in passing that an award may be modified based on manifest disregard, despite the fact that the parties were seeking only vacatur, not modification. *See Elec.*

*Data Sys. Corp. v. Donelson*, 473 F.3d 684, 686, 691 (6th Cir. 2007); *Buchignani v. Vining-Sparks IBG*, No. 98-6692, 2000 WL 263344, at *1–2 (6th Cir. 2000). Another case made a similar comment, without indicating that modification had been sought below and without concluding that modification was warranted. *See Legair v. Circuit City Stores, Inc.*, 213 F. App'x 436, 439 (6th Cir. 2007). By contrast, the vast majority of our decisions applying the manifest-disregard standard do so only to determine whether vacatur is an appropriate remedy. *See, e.g.*, *Coffee Beanery, Ltd. v. WW, L.L.C.*, No. 07-1830, 2008 WL 4899478, at *3 (6th Cir. Nov. 14, 2008); *Donelson*, 473 F.3d at 686, 691; *Jaros*, 70 F.3d at 421; *Anaconda Co. v. Dist. Lodge No. 27, Int'l Ass'n of Machinists*, 693 F.2d 35, 37–38 (6th Cir. 1982). *NCR* remains the law of this circuit and prohibits modifying an award based on an alleged "manifest disregard" of law.

IV.

For these reasons, we affirm.

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**Case No. 03-72486**

**[Filed February 14, 2008]**

| | |
|---|---|
| PETER G. GRAIN, M.D. and ANNETTE BARNES, M.D., | ) |
| Plaintiffs, | ) |
| v. | ) |
| TRINITY HEALTH, MERCY HEALTH SERVICES, INC. d/b/a MERCY HOSPITAL - PORT HURON, MARY TRIMMER, JERE BALDWIN, M.D., BERNARD VELARDO, M.D., and MAHMOUD CHAFTE, M.D., | ) |
| Defendants. | ) |

Honorable Patrick J. Duggan

**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR (i) CONFIRMATION OF ARBITRATION AWARD AND (ii)**

**ADJUSTMENT OF AWARD OF ATTORNEYS' FEES AND COSTS AND INTEREST**

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on February 14, 2008.

PRESENT: THE HONORABLE PATRICK J. DUGGAN U.S. DISTRICT COURT JUDGE

Plaintiffs Peter Grain, M.D. ("Dr. Grain") and Annette Barnes, M.D. ("Dr. Barnes") filed a sixteen-count complaint against Defendants on June 26, 2003. Defendants thereafter filed a motion to compel arbitration with respect to some, but not all, of Plaintiff's claims. On August 11, 2004, this Court granted Defendants' motion and stayed Plaintiffs' remaining claims pending arbitration. On December 12, 2007, an arbitration panel entered an award in favor of Dr. Grain on his breach of contract claim against Defendants Mercy Hospital Port-Huron ("Mercy Hospital"), Trinity Health ("Trinity"), and Mary Trimmer ("Ms. Trimmer"). In the arbitration award, the panel awarded Dr. Grain damages on his breach of contract claim in the sum of $518,625, attorneys' fees of $1,145,294.35, and costs of $490,476.20, less Defendants' attorneys' fees and costs of $512,525.11, for a net award of $1,635,770.55 plus interest from October 28, 2004. The arbitration panel entered judgment in favor of Defendants and against Dr. Grain and Dr. Barnes on the remaining claims arbitrated.

Presently before the Court is Plaintiffs' motion for (i) confirmation of the arbitration award and (ii) adjustment of award of attorneys' fees and costs and

interest, filed December 22, 2007. Defendants filed a response on January 22, 2008, in which they support confirmation of the arbitration award but oppose Plaintiffs' motion to modify. On February 12, 2007, this Court issued a notice to inform the parties that it is dispensing with oral argument with respect to Plaintiffs' motion pursuant to Eastern District of Michigan Local Rule 7.1(e)(2).

In their motion, Plaintiffs contend that the arbitration panel exceeded its authority and erred as a matter of law in calculating Dr. Grain's award of attorneys' fees, costs and interest. Specifically, Plaintiffs claim that the arbitration panel improperly (i) awarded Dr. Grain "reasonable" attorneys' fees rather than the "actual" fees he incurred; (ii) concluded that Dr. Grain only prevailed with respect to 75% of his case and therefore was entitled to only 75% of his fees and costs and was obligated to pay 25% of Defendants' fees and costs; (iii) excluded fees and costs incurred prior to August 11, 2004; and (iv) awarded interest from only October 10, 2004 (the date Defendants' filed the arbitration claim) rather than the date of the breach or when Plaintiffs' complaint was filed and only on the damage award. In response, Defendants argue that Plaintiffs fail to meet the requirements of the Federal Arbitration Act for modifying an arbitration award, 9 U.S.C. § 11. Alternatively, Defendants argue that the arbitration panel's award of attorneys' fees, costs and interest was correct.

The Sixth Circuit Court of Appeals has made clear that a request to vacate an arbitration award "in part" "is synonymous with modifying an award." *NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995).

The court also made clear that a request to modify an arbitration award is governed by 9 U.S.C. § 11, as opposed to 9 U.S.C. § 10 which only governs a court's power to *vacate* an award. As the Sixth Circuit stated: "A court's power to *modify* an arbitration award is confined to the grounds specified in [Section] 11." *Id.*

Section 11 provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration–
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11. Plaintiffs fail to demonstrate that any of the reasons set forth in Section 11 are present in the

current matter to grant the Court the power to make the requested modifications.[1]

Plaintiffs do not identify a miscalculation of figures or mistake in the description of any person, thing, or property referred to in the award. Further, there can be no dispute that the issue of attorneys' fees, costs, and interest was submitted to the arbitration panel. The amount of Dr. Grain' award is a matter affecting the merits of the arbitration panel's decision. *See NCR Corp.*, 43 F.3d at 1081 (indicating that an increase in the amount of the arbitration award is "clearly a modification that would affect 'the merits of the controversy.'") Finally, it is evident from the arbitration award that a modification is not necessary to effect the attorneys' fees, costs, and interest the arbitration panel intended to award Dr. Grain.

While Plaintiffs argue that a modification is warranted as a result of the arbitration panel's alleged errors of law, as the cases cited in Plaintiffs' motion indicate, the Michigan courts and the Sixth Circuit have identified the arbitration panel's "manifest disregard of the law" only as a basis for *vacating* an arbitration award. (Pls.' Mot. at 4-5, citing *Guardian Alarm Co. of Mich v. Richard T.* May, No. 269901, 2007 WL 4245411, at *3 (Mich. Ct. App. Dec. 4, 2007) (unpublished op.); *DAIIE v. Gavin*, 416 Mich. 407, 434, 331 N.W.2d 418 (1982); *Electronic Data Systems, Inc. v. Donelson*, 473 F.3d 684, 688 (6th Cir. 2007)). As the Michigan Supreme Court stated in *DAIIE*: "Where it

---

[1] Notably, Plaintiffs have not responded to Defendants' argument that Section 11 governs and that Plaintiffs fail to set forth a reason under that section for the Court to modify the award.

clearly appears on the face of the award or for the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision *will be set aside*." 416 Mich. at 434, 331 N.W.2d at 443 (emphasis added); *see also Electronic Data Sys., Inc.*, 473 F.3d at 688 ("In addition [to the reasons set forth in 9 U.S.C. § 10], a reviewing court may *vacate* an award where the arbitrators have manifestly disregarded the law.") The Court is unaware of any case and Plaintiffs fail to identify a case where the arbitration panel's manifest disregard of the law affords a court the power to modify an arbitration award.

Accordingly,

**IT IS ORDERED**, that Plaintiffs' motion for confirmation of arbitration award is **GRANTED**, but Plaintiffs' motion for adjustment of award of attorneys' fees and costs and interest is **DENIED**.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
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Richard J. Seryak, Esq.
Russell F. Ethridge, Esq.

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**Case No. 03-72486**

**[Filed April 11, 2008]**

| | |
|---|---|
| PETER G. GRAIN, M.D. and ANNETTE BARNES, M.D., | ) |
| Plaintiffs, | ) |
| v. | ) |
| TRINITY HEALTH, MERCY HEALTH SERVICES, INC. d/b/a MERCY HOSPITAL - PORT HURON, MARY TRIMMER, JERE BALDWIN, M.D., BERNARD VELARDO, M.D., and MAHMOUD CHAFTE, M.D., | ) |
| Defendants. | ) |

Honorable Patrick J. Duggan

**OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DATED FEBRUARY 14, 2008**

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on April 11, 2008.

PRESENT: THE HONORABLE PATRICK J. DUGGAN U.S. DISTRICT COURT JUDGE

Plaintiffs Peter Grain, M.D. ("Dr. Grain") and Annette Barnes, M.D. ("Dr. Barnes") (collectively "Plaintiffs") filed a sixteen-count complaint against Defendants on June 26, 2003. Defendants thereafter filed a motion to compel arbitration with respect to some, but not all, of Plaintiff's claim. On August 11, 2004, this Court granted Defendants' motion and stayed Plaintiffs' remaining claims pending arbitration. On December 12, 2007, an arbitration panel entered an arbitration award in which it *inter alia* granted Dr. Grain damages on his breach of contract claim, attorneys' fees, costs, and interest.[1] Plaintiffs thereafter filed a motion for (i) confirmation of the arbitration award and (ii) adjustment of the panel's award of attorneys' fees, costs, and interest. On February 14, 2008, this Court issued an opinion and order granting Plaintiffs' request to confirm the arbitration award and denying Plaintiffs' request to modify the attorneys' fees, costs, and interest awarded.

Presently before the Court is Plaintiffs' motion for reconsideration of the Court's opinion and order, filed February 29, 2008. The Court issued a notice on March 4, 2008, informing the parties that it would

---

[1] The Arbitration Panel entered judgment in favor of Defendants and against Dr. Grain and Dr. Barnes on the remaining claims arbitrated.

permit Defendants to submit a response to Plaintiffs' motion, if they wished to respond. Defendants filed a response on March 14, 2008. Now, having considered the parties' pleadings, the Court denies Plaintiffs' motion.

**Standard for Reconsideration**

Eastern District of Michigan Local Rule 7.1(g) provides that a motion for reconsideration only should be granted if the movant demonstrates that the court and the parties have been misled by a palpable defect and that a different disposition of the case must result from a correction of such a palpable defect. E.D. Mich. LR 7.1(g). A motion that merely presents the same issues already ruled upon by the court shall not be granted. *Id.* Similarly, a motion to alter or amend the judgment pursuant to Rule 59(e) may be granted if there is a clear error of law, *see Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998), newly discovered evidence, *see id.*, an intervening change in controlling law, *Collison v. Int'l Chem. Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir.1994); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90-91 n. 3 (1st Cir.1993); *School District No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993), or to prevent manifest injustice. *Davis v. Jellico Cmty. Hosp., Inc.*, 912 F.2d 129, 133 (6th Cir. 1990). A motion brought pursuant to Rule 59(e) or Local Rule 7.1(g) must be filed no later than 10 days after entry of the judgment or Order. FED. R. CIV. P. 59(e); E.D. Mich. LR 7.1(g)(1).

## Analysis

In their previous motion for adjustment of the arbitration panel's award of attorneys' fees, costs, and interest, Plaintiffs contended that the panel exceeded its authority and erred as a matter of law in calculating those aspects of the award. In the opinion and order dated February 14, 2008, this Court held that its power to modify the arbitration award was confined to the grounds specified in 9 U.S.C. § 11 and that those grounds did not include the errors Plaintiffs asserted. (2/14/08 Op. and Order at 3, 5.) The Court further held that Plaintiffs failed to demonstrate that any of the reasons set forth in § 11 applied in the present matter to grant the Court the power to make the requested modifications. (*Id.* at 4.)

9 U.S.C. § 11 provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11. In concluding that none of the reasons set forth in § 11 were present in the current matter to grant the Court power to modify the arbitration award as Plaintiffs requested, this Court reasoned:

> Plaintiffs do not identify a miscalculation of figures or mistake in the description of any person, thing, or property referred to in the award. Further, there can be no dispute that the issue of attorneys' fees, costs, and interest was submitted to the arbitration panel. The amount of Dr. Grain's award is a matter affecting the merits of the arbitration panel's decision. . . . Finally, it is evident from the arbitration award that a modification is not necessary to effect the attorneys' fees, costs, and interest the arbitration panel intended to award Dr. Grain.

(2/14/08 Op. and Order at 4.) Plaintiffs now contend that the Court committed two errors in reaching this conclusion.

First, Plaintiffs contend that this Court erred in finding that the arbitration panel's manifest disregard of the law is not a ground for modification of an arbitration award. In support of this contention, Plaintiffs cite a number of federal circuit and district

court cases. (Pls.' Br. in Supp. of Mot. at 5.) Second, Plaintiffs argue that the Court erred in concluding that 9 U.S.C. § 11(c) does not provide a basis for modifying the award. Plaintiffs argue that the Court incorrectly concluded that this subsection is inapplicable because a decision relating to the award of attorneys' fees and costs "affect[s] the merits of the controversy."

With respect to Plaintiffs' first argument, the Sixth Circuit Court of Appeals has made clear that "[a] court's power to *modify* an arbitration award *is confined to* the grounds specified in § 11." *NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995) (second emphasis added). To the extent the cases Plaintiffs cite hold otherwise, none of those cases are Sixth Circuit decisions. This Court is bound to follow Sixth Circuit precedent.[2]

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[2] In any event, the Court cannot conclude that the arbitrators manifestly disregarded the law when they limited Dr. Grain's award for attorneys' fees, costs, and interest. The "manifest disregard of the law" standard provides "a very narrow standard of review." *Elec. Data Sys. Corp. v. Donelson*, 473 F.3d 684, 691 (6th Cir. 2007) (citation omitted). "'An arbitration 'must fly in the face of established legal precedent' . . . to find manifest disregard of the law." *Id.* (quoting *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995)). "If a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside." *Jaros*, 70 F.3d at 421. The applicable legal principle that the arbitrator allegedly disregarded must be "clearly defined and not subject to reasonable debate" and the arbitrators must have "refused to heed that legal principle." *Id.*

With respect to Plaintiffs' second argument, the Court continues to believe that an increase in the amount of the arbitration panel's award is a modification "affecting the merits of the controversy." Even if the Court erred in this respect, however, § 11(c) does not provide a basis for modifying the award.

Section 11(c) applies "[w]here the award is imperfect in matter of *form*." 9 U.S.C. § 11(c) (emphasis added). While the Court was able to locate only a few cases where courts relied on this reason to modify an arbitration award, those cases and the plain language of § 11 indicate that the phrase "imperfect in matter of form" does not refer to allegedly inaccurate legal conclusions by the arbitrator. *See Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1282-84 (5th Cir. 1994) (allowing modification to include money owed to the plaintiff, which arbitrator clearly intended to award but which was omitted from written arbitration award); *Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10, 14-15 (D. Mass 2002) (modifying arbitration award where the amount of the award in the arbitrator's written award is inconsistent with what the panel said at the conclusion of the arbitration hearing); *Fischer v. CGA Computer Assoc.*, 612 F. Supp. 2d 1038, 1041-42 (S.D.N.Y. 1985) (concluding that the court was authorized to modify the arbitration award by substituting "DECLARES" for "FINDS," as the statements that followed clearly were the arbitrators' declarations of the parties' rights and duties and were in the nature of an award); *see also Mantaline Corp. v. PPG Indus., Inc.*, No. 2:02CV269, 2006 WL 297263, at *5 (W.D. Pa. 2006) (unpublished opinion) (finding that the arbitration panel's award of attorneys' fees and

costs for which there was no support in the record was not "imperfect in matter of form" where "[t]he issue of attorney's fees was presented to the arbitrator, and he made a clear determination of the parties' rights to attorney's fees . . ."). As the Second Circuit Court of Appeals has provided: "Section 11(c) . . . does not license the district court to substitute its judgment for that of the arbitrators." *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (1980). Because this in fact is exactly what Plaintiffs are asking the Court to do here, the Court concludes that § 11(c) does not provided a basis for modifying the arbitration award. This conclusion is further supported by the Court's belief that modification of the award is not necessary to effect the attorneys' fees, costs, and interest the arbitration panel intended to award Dr. Grain. 9 U.S.C. § 11 ("The order may modify and correct the award, so as to effect the intent thereof . . .").

For the above reasons, the Court concludes that it did not err in denying Plaintiffs' motion to modify the arbitration award.

Accordingly,

**IT IS ORDERED**, that Plaintiffs' motion for reconsideration of the Court's order dated February 14, 2008 is **DENIED**.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

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## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 08-1410**

**[Filed February 25, 2009]**

| | |
|---|---|
| PETER G. GRAIN, M.D., ET AL., | ) |
| | ) |
| Plaintiffs-Appellants, | ) |
| | ) |
| v. | ) |
| | ) |
| TRINITY HEALTH, ET AL., | ) |
| | ) |
| Defendants-Appellees. | ) |
| | ) |

**BEFORE:** ROGERS, SUTTON, and MCKEAGUE, Circuit Judges.

O R D E R

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/
Leonard Green
Clerk

No. 08-1446

FILED
JUL 2 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
# Supreme Court of the United States

PETER G. GRAIN, *et ux.*,

*Petitioners,*

*v.*

TRINITY HEALTH, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTION PRESENTED

Whether an arbitration award governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, may be modified based on the arbitrators' alleged manifest disregard of the law where it is undisputed that the grounds for modification set forth in FAA § 11 are not met and where the district court properly found that petitioners had not established manifest disregard in any event.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The proper name for Respondent "Trinity Health" is Trinity Health-Michigan, which is a Michigan, non-profit corporation and a wholly controlled subsidiary of Trinity Health Corporation, which is an Indiana, non-profit corporation. There is no publicly held company that owns 10% or more of the stock of either corporate entity.

Mercy Hospital Port Huron is an unincorporated division of Trinity Health-Michigan.

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## INTRODUCTION

This case, governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, concerns petitioners' efforts to double a $1.6 million arbitration award that was confirmed by the district court on petitioners' motion and satisfied in full by respondents. Petitioners seek modification of the award despite the fact that they cannot meet—and, in fact, no longer even contend that they meet—the exclusive and narrow grounds enumerated in FAA § 11 for modification of arbitration awards. The district court and the Sixth Circuit properly rejected petitioners' arguments, and petitioners demonstrate no compelling reason to grant their Petition for a Writ of *Certiorari*.

In 1997, petitioners entered into contracts that each contained a predispute arbitration agreement providing that "any disputes involving the interpretation, breach or enforcement" of the underlying contract were to be resolved by "binding arbitration pursuant to the rules of the American Arbitration Association." Petitioners filed suit in the district court on federal statutory claims as well as state law claims that were plainly subject to the arbitration agreement. Respondents then moved to compel arbitration of the breach of contract and related claims pursuant to the FAA. The district court ordered arbitration.

After three years of arbitration proceedings and 45 days of hearing, the three-person arbitration panel issued its unanimous 21-page award, in which petitioner Peter Grain was awarded damages of $518,625 and net attorney fees and costs of $1,123,245, for a total award

of $1,641,870. Petitioners then moved for confirmation of the award, but asked the district court to "adjust" the amount of attorney fees and costs by awarding them an additional $1,539,219, and to increase the award further by providing for additional interest. Petitioners' requested modification, if granted, would have more than doubled the arbitration panel's total award and reversed its meticulous rulings on attorney fees, costs and interest.

The district court correctly refused to modify the award, holding that (1) petitioners had not satisfied the grounds set forth in FAA § 11 that permit modification of an arbitration award; (2) alleged "manifest disregard" of the law is not a basis on which an arbitration award can be modified under the FAA; and (3) petitioners had not demonstrated that the arbitrators had manifestly disregarded the law in any event. The Sixth Circuit affirmed, holding that a court's power to modify an arbitration award is confined to the grounds set forth in FAA § 11 and petitioners had not demonstrated that they were entitled to modification under § 11.

Petitioners now seek review by this Court. Abandoning their futile efforts to demonstrate that they are entitled to modification of the award under the narrow and exclusive grounds set forth in FAA § 11, petitioners change tack and attempt to present new issues never before presented in the case. Petitioners claim this Court's recent decision in *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1406 (2008), empowered the district court to modify the award due to the arbitration panel's supposed manifest disregard of Michigan common law. Petitioners further claim that

the generic choice of law provision contained in the parties' underlying contract converts the predispute arbitration agreement into a "restricted submission" to the arbitrators, and that this so-called "restricted submission" required the district court to review their motion under the manifest disregard standard rather than under the narrow and exclusive grounds set forth in FAA § 11. Finally, petitioners claim that the Sixth Circuit's refusal to recognize manifest disregard as a basis on which to modify an award under FAA § 11 creates a split of authority with the Second Circuit.

Petitioners' arguments are baseless. As an initial matter, petitioners' efforts to inject new issues into the case are plainly improper under this Court's precedents. More fundamentally, their efforts are legally futile. First, this Court's recent decision in *Hall Street* confirms that FAA § 11 provides the "*exclusive*" grounds for modifying an arbitration award. *Hall Street*, 128 S.Ct. at 1403 (emphasis supplied). While this Court acknowledged in *dicta* that in a proper case parties might seek enforcement of an arbitration award under state statutory or common law, this is not and never was such a case. Here, arbitration was sought and ordered under the FAA, the award was confirmed by the district court under the FAA, petitioners appealed to the Sixth Circuit under the FAA, and the Sixth Circuit affirmed under the FAA. In short, the FAA applies the substantive law for review of the arbitration award. Second, settled authority from both this Court and circuit courts establishes that a generic choice of law provision supplies only the law that governs the parties' substantive rights and obligations, and does not supplant the statutory grounds set forth in the FAA for review of arbitration

awards. Petitioners' efforts to avoid this result through characterizing the choice of law provision as constituting a "restricted submission" to the arbitrators is simply wrong. Third, petitioners cannot demonstrate a split of circuit authority that warrants issuance of a writ of *certiorari*. Finally, as the district court properly found, petitioners cannot demonstrate that the arbitrators manifestly disregarded the law in any event.

Petitioners plainly have not established any compelling reason for this Court to grant their petition. Accordingly, the petition should be denied.

## STATEMENT OF THE CASE

### A. Factual Background of Dispute

On June 27, 1997, petitioners Peter Grain, M.D. and his wife, Annette Barnes, M.D. each entered into independent Income Guarantee Agreements ("IGA") with Mercy Health Services, Inc. ("Mercy Hospital"), an unincorporated division of Defendant Trinity Health. The IGA between Dr. Grain and Mercy Hospital was terminated by notice on January 28, 1999, which was memorialized in a Termination and Release Agreement on February 2, 1999.

Both IGAs contained the following arbitration clause:

> 4. **Dispute Resolution.** Any disputes involving the interpretation, breach or enforcement of this Agreement which cannot be resolved by Hospital and Physician shall be resolved by binding arbitration in

> accordance with the rules of the American Arbitration Association. The prevailing party shall be awarded his/its costs, including actual attorney fees. The arbitration panel or sole arbitrator, as may be applicable, shall consist of at least one certified public accountant. Decisions of the arbitration panel will be binding on both Hospital and the Physician. (J.A. 61).

The IGAs also contained the following separate, generic choice of law provision:

> **13. Governing Law.** The validity and interpretation of the Agreement shall be governed by the laws of the State of Michigan. (J.A. 65).

### B. June 26, 2003: Suit Filed in Federal District Court

Petitioners filed a 16-Count Complaint in the district court on June 26, 2003, asserting both federal and state law claims. On November 7, 2003, respondents filed a motion for partial summary judgment, for partial stay and to compel arbitration pursuant to the FAA. While petitioners contended that certain of their claims should not be arbitrated, they never once challenged the applicability of the FAA to the arbitration provisions in the IGAs. On August 11, 2004, after dismissing several of petitioners' claims, the district court granted respondents' motion and referred six claims to arbitration: Dr. Grain's claims for rescission of the Release, breach of his IGA, misrepresentation, and extortion; and Dr. Barnes' claims for breach of her IGA

and misrepresentation. The Court stayed proceedings on the remaining claims pending arbitration. On October 28, 2004, over two months after the district court held that petitioners were required to arbitrate six of their claims, petitioners filed an arbitration demand with the American Arbitration Association (AAA).

### C. October 2004 – December 2007: Arbitration of Six Claims

The arbitration proceedings were presided over by a three-member panel of attorneys, one of whom is also a licensed Certified Public Accountant. The arbitration proceedings lasted over three years, including 45 days of hearings that took place between September 11, 2006, and May 24, 2007. Thereafter, the parties submitted post-hearing briefs and petitions for attorney fees and costs and briefs in support.

On December 10, 2007, the arbitration panel issued its 21-page unanimous award. The panel granted Dr. Grain's rescission and breach of contract claims, but rejected his extortion and misrepresentation claims. The panel expressly denied Dr. Grain's claims for exemplary, emotional distress and extra-contractual damages. The panel ruled against Dr. Barnes on both of the claims she presented for arbitration. In the arbitration, Plaintiffs requested **$9,666,943.00** in damages for Dr. Grain and **$809,338.14** in damages for Dr. Barnes. The panel awarded **$518,625** to Dr. Grain, only 5% of the total amount claimed, and nothing to Dr. Barnes. (J.A. 274-75.)

### D. Arbitration Panel's Resolution of Competing Claims for Attorney Fees and Costs

The arbitration panel next addressed the issue of attorney fees and costs. Petitioners sought $3,651,894.68 in attorney fees and costs in connection with the claims on which Dr. Grain prevailed, and respondents sought $1,712,225.50 in fees and costs in connection with the claims on which they prevailed. Notably, while petitioners now claim that the arbitration panel "manifestly disregarded" Michigan law pertaining to the award of interest, petitioners neither sought interest in connection with their petition for fees and costs nor briefed the issue in their submissions to the arbitration panel. The AAA rules governing the arbitration granted the panel the discretion to award interest, and, if so, to determine the appropriate rate and the date from which interest would be computed. AAA Commercial Arbitration Rule R-43(d)(1) (2005); *see infra* Argument IV.

Respondents opposed petitioners' astronomical petition for fees and costs, contending that (1) petitioners improperly sought fees and costs for periods of time prior to the date on which they demanded arbitration pursuant to the district court's order; (2) that petitioners were not entitled to fees and costs in connection with claims on which they had not prevailed; and (3) that their requested fees and costs were duplicative and excessive. The panel devoted seven pages of its 21-page award to the issues presented by the parties' competing petitions for attorney fees and costs, ultimately ruling in part in Dr. Grain's favor and to a lesser extent in respondents' favor.

The panel first held that August 11, 2004, the date on which the district court ordered arbitration, would be the commencement date for accruing fees and costs, rejecting petitioners' claim that they should be awarded fees and costs starting when respondents filed their motion to compel arbitration on November 7, 2003.

Next, the panel considered the parties' arguments regarding the construction of the term "prevailing party" as set forth in paragraph 4 of both IGAs. The panel ruled that respondents were the prevailing parties on all of Dr. Barnes' claims, allocating 10% of the petitioners' total fees and costs to her claims and discounting their total request by this amount, and awarding respondents 10% of their attorney fees and costs. The panel then determined how much of the balance of 90% of fees and costs should be awarded to Dr. Grain and how much should be awarded to respondents, as both prevailed in part with respect to his claims. Rejecting respondents' argument that Dr. Grain should be determined the prevailing party with respect to only 50% of his claims (because he prevailed on only two of his four claims), the panel ruled that three of Dr. Grain's claims – breach of contract, rescission, and civil extortion – arose out of the same common core of fact and constituted 75% of his claim; and that the misrepresentation claim was a separate claim and constituted 25% of his claim. Based on this 75/25 allocation, the panel awarded Dr. Grain 75% of the fees and costs attributable to him, *i.e.*, 75% of 90% of the total fees and costs. Defendants were awarded 25% of the 90% of their fees and costs that the panel attributed to the defense of Dr. Grain's claims. This allocation was properly grounded in Michigan law. *See infra* Argument IV.

The panel then turned to the parties' arguments regarding duplicative and excessive fees. Throughout the arbitration, petitioners were represented by two law firms, Choate, Hall & Stewart, L.L.P. based in Boston, and Hertz, Schram & Saretsky, P.C. based in Bloomfield Hills, Michigan. Their services were in many instances duplicative, and Michigan counsel Elmer Roller in particular was culpable of excessive and duplicative billings.[1] The arbitration panel ruled that Mr. Roller charged for excessive hours and reduced the Plaintiffs' fees by $10,000.00. Respondents also contended in the arbitration that petitioners' counsel's hourly rates must reflect the rates charged in the Detroit area and that petitioners were not entitled to recover fees and costs attributable to travel by their Boston counsel. The arbitration panel granted respondents partial relief on these issues, reducing the hourly rates of certain Choate attorneys, reducing travel fees by 35%, and disallowing certain travel expenses.

Ultimately, the panel awarded petitioner Grain $1,635,770 in attorney fees and costs and awarded respondents $512,525 in fees and costs. After subtracting the fees and costs awarded to respondents from those awarded petitioners, the panel's net award to petitioners for attorney fees and costs was $1,123,245. Dr. Grain's combined total award of damages ($518,625) and fees and costs was thus $1,641,870. Although petitioners did not even request an award of interest from the panel or provide the panel with what they

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1. *E.g.*, Mr. Roller recorded billable hours on several occasion of 18 to 28.5 hours of service per day and repeated cost items verbatim from invoice to invoice.

deemed to be the legal principles governing an award of interest, the panel awarded interest on the damage portion of the award from October 28, 2004, the date on which petitioners filed their arbitration demand. (J.A. 280-84.)

### E. Respondents Fully Satisfy Arbitration Award on January 30, 2008

At a conference with the district court on January 30, 2008, respondents' counsel delivered a check in the amount of $1,700,930.08 to petitioners' counsel, reflecting payment in full of the arbitration award together with all accrued interest on the damage award as ordered by the arbitration panel.

### F. Post-Arbitration Award Motions and Rulings

On December 21, 2007, petitioners filed their Motion for "(i) Confirmation of Arbitration Award and (ii) Adjustment of Award of Attorneys' Fees and Costs and Interest." Petitioners asked that the panel's award be confirmed, but that the court modify it to increase their award of attorney fees and costs by an additional $1,539,219, and to calculate additional interest. If granted, this "modification" would have more than doubled the arbitration award. Respondents filed a brief in support of confirmation of the award and in opposition to modification, demonstrating that modification was not available under FAA § 11 and that the panel's decision regarding attorney fees, costs and interest was correct in any event.

The district court agreed with respondents, holding pursuant to governing precedent in the Sixth Circuit that "a request to vacate an arbitration award 'in part' 'is synonymous with modifying an award.'" Pet. for Cert. App. 14a (*citing NCR Corp. v. Sac-Co, Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995)). The district court held that petitioners' motion was governed by FAA § 11, which permits modification under only limited enumerated circumstances and that petitioners had not demonstrated that they met those statutory grounds. The district court further held that the panel's alleged errors of law did not permit modification of the arbitration award because alleged "manifest disregard of the law" does not permit modifying an award. The Court thus granted petitioners' motion for confirmation of the arbitration award and denied their motion for adjustment of the award of attorney fees and costs. Pet. for Cert. App. 17a.

Petitioners then filed a motion for reconsideration, arguing that the arbitration panel's alleged "manifest disregard of the law" provided grounds to modify the arbitration award, and that the district court should modify the award under FAA § 11(c), which permits modification where "the award is imperfect in matter of form not affecting the merits of the controversy." The district court denied petitioners' motion, rejecting all of the arguments they advanced. First, the court adhered to its prior ruling under *NCR Corp.* that "a court's power to *modify* an arbitration award is *confined to* the grounds specified in § 11," and that it could not modify the award due to the panel's alleged manifest disregard of law. Pet. for Cert. App. 23a (emphasis in original). The district court also held that petitioners

had not established that the arbitration panel had manifestly disregarded the law, and that modification of the award was not necessary to effect the intent of the award. *Id.* n. 2. Finally, the court held that FAA § 11(c) did not provide a basis for modification of the award in this case, because that section applies only where the award is "imperfect in matter of form," a phrase that "does not refer to allegedly inaccurate legal conclusions by the arbitrator." Pet. for Cert. App. 24a.

### G. The Sixth Circuit Properly Affirms the District Court's Rulings and Denies Rehearing and Rehearing *En Banc*

Petitioners appealed to the Sixth Circuit pursuant to FAA § 16, contending that they had demonstrated grounds for modification of the award under FAA § 11 and alternatively that the FAA permitted modification on the judicially-created ground of manifest disregard of the law. The Sixth Circuit correctly rejected both arguments. Pet. for Cert. App. 7a. The court first held that petitioners had not demonstrated that modification of the award could be justified under FAA § 11(a) because that subsection is available only to correct "an evident material miscalculation of figures" and there was no such error in the award. The court held that petitioners fared no better under § 11(c), as that provision permits modification only where the award is "imperfect in a matter of form not affecting the merits of the controversy," and there was no such "technical error" in the award. Pet. for Cert. App. 8a-9a. Finally, the court rejected petitioners' argument that the FAA

permitted modification of the award based on the arbitrators' alleged manifest disregard of the law. The court pointed out that "manifest disregard" appears nowhere in FAA § 11, and that the enumerated grounds set forth in FAA § 11 provide the "'exclusive' grounds for obtaining relief from an arbitration decision."

> To the extent that "manifest disregard" is "shorthand" for the grounds enumerated in § 11, as the Supreme Court suggested might be the case for some of the grounds listed in § 10, *id.* at 1404, that does Grain and Barnes no good. As we have shown, the enumerated grounds upon which they rely simply do not apply to their merits-based complaints about the award.

Pet. for Cert. App. 9a (*quoting Hall Street*, 128 S.Ct. at 1406). The court adhered to circuit precedent holding that a court's power to modify an arbitration award is confined to the grounds specified in FAA § 11, and that manifest disregard is not a basis on which modification is available. Pet. for Cert. App. 10a-11a. The court thus affirmed the district court's judgment. Petitioners' subsequent motion for rehearing and suggestion for rehearing *en banc* were denied.

## REASONS FOR DENYING THE PETITION

The decisions below do not conflict with any decision of this Court or any court of appeals, nor do they implicate a federal question that has not been decided by this Court. Petitioners have not demonstrated compelling reasons for granting a writ of *certiorari*. Instead, petitioners attempt to inject new issues into the case that have never before been asserted, thereby seeking to sidestep this Court's recent pronouncements in *Hall Street*. Petitioners' efforts are aimed at avoiding the finality of the arbitration award that they themselves sought to confirm and which has been fully satisfied by Respondents. Petitioners' efforts are futile. This Court's precedents make clear that their attempt to inject new issues into the case is improper, and that their efforts to sidestep controlling case law are legally futile in any event. Their petition should be denied.

### I. PETITIONERS' EFFORT TO INJECT NEW ISSUES INTO THIS CASE IN THEIR PETITION FOR *CERTIORARI* IS IMPROPER UNDER THIS COURT'S PRECEDENTS

Petitioners raise two issues never before raised in this case and not ruled upon by the Sixth Circuit or the district court. Petitioners assert pursuant to *dicta* in *Hall Street*, 128 S.Ct at 1406, that they may seek review of the arbitration award under Michigan common law, apart from the statutory criteria set forth in the FAA (Pet. for Cert. at 13, 15); and that the generic choice-of law provision in the parties' underlying agreements transformed the general demand for arbitration into a "restricted" submission to the arbitrators that requires

application of the manifest disregard standard (Pet. for Cert. at 17-18). While both issues are demonstrably meritless (see Argument II below), this Court should refrain from considering them because they were not raised in the court of appeals or ruled on by that court.

In numerous cases, this Court has declined to consider issues not asserted or passed upon by the court of appeals. In *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981), for example, this Court refused to consider whether the district court had abused its discretion under Fed. R. Civ. P. 54(d) in denying costs to the defendant where that issue had not been raised in the court of appeals, and limited its decision to the propriety of an award of costs under Fed. R. Civ. P. 68. Likewise, in *U.S. v. United Foods, Inc.*, 533 U.S. 405, 417 (2001), a First Amendment case, this Court refused to consider the government's claim that the speech in question was immune from scrutiny because the issue was not raised before the court of appeals or passed on by that court.

> Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, see, *e.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 526, n. 11 (1998), it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.

*United Foods, Inc.*, 533 U.S. at 417. *Accord Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998).

Like the petitioners in the cited cases, petitioners here attempt to attack the underlying judgment through injection of new grounds not pressed or passed on below. Petitioners' claims that *Hall Street* permits application of the manifest disregard standard apart from the FAA and that the generic choice-of-law provision in the parties' contract transformed the arbitration into a "restricted" submission of their claims to arbitration have never before been presented in this case. Petitioners may try to argue that this Court's March 2008 decision in *Hall Street* justifies injection of the first issue at this stage of the proceedings, but any such argument would be baseless in light of the fact that petitioners expressly addressed *Hall Street* before the Sixth Circuit, contending only that the case did not abrogate the manifest disregard standard *under* the FAA. Petitioners wholly failed to raise the issue that manifest disregard is justified on grounds *apart* from the FAA. Petitioners' failure to raise the so-called "restricted submission" issue prior to now plainly cannot be justified on the basis of new law, as the *Wilko* decision on which it is based was issued 56 years ago.

Petitioners cannot justify raising new issues in their effort to attack the judgment in this case. Respondents request that the Court decline to consider these issues.

## II. FAA § 11 SETS FORTH THE EXCLUSIVE GROUNDS ON WHICH AN ARBITRATION AWARD MAY BE MODIFIED AND DOES NOT PERMIT MODIFICATION FOR ALLEGED MANIFEST DISREGARD OF STATE SUBSTANTIVE LAW

### A. This Court has Expressly Held that the FAA Enumerates the Limited and Exclusive Grounds for Modifying an Arbitration Award

As recently stated by this Court, the FAA reflects a comprehensive statutory scheme that favors resolution of disputes pursuant to arbitration and supplies expedited bases for enforcing an arbitration award, "specifically, a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it." *Hall Street*, 128 S.Ct. at 1402.

> An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court. § 6. ***Under the terms of § 9, a court "must" confirm an arbitration award "unless" it is vacated, modified or corrected "as prescribed" in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one.***

*Id.* (emphasis added).

As the FAA itself reveals, the grounds for seeking vacatur or modification of an arbitration award are not identical. Section 11 provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> > **(a)** Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
> >
> > **(b)** Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
> >
> > **(c)** Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11.

The grounds enumerated in FAA § 10 for vacating an arbitration award, in contrast, are much broader than those set forth in FAA § 11. Section 10 provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> > (1) where the award was procured by corruption, fraud, or undue means;
> >
> > (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> >
> > (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> >
> > (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. In recognition that the enumerated grounds in FAA § 11 for *modifying* an arbitration award

are specific and limited, the Sixth Circuit has long adhered to the principle that "a court's power to *modify* an arbitration award is confined to the grounds specified in § 11." *NCR Corp. v. Sac-Co, Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995).

In *Hall Street*, this Court granted *certiorari* to answer the question whether the parties to an arbitration agreement governed by the FAA could contract for a standard of judicial review that varied from the grounds set forth in FAA §§ 10 and 11. The parties had entered into an arbitration agreement that provided that the reviewing court "shall ***vacate, modify or correct*** any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." *Hall Street*, 128 S.Ct at 1400-1401 (emphasis added). The district court had modified the award to provide for additional interest, expressly invoking the standard of review chosen by the parties. The Ninth Circuit reversed this decision, holding that the parties' attempt to modify the standard of judicial review that applied under the FAA was unenforceable. This Court affirmed the Ninth Circuit, holding that ***"§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."*** *Id.* at 1403 (emphasis added).

In reaching this decision, this Court rejected petitioner Hall Street Associates' argument that expanded judicial review was justified under *Wilko v. Swan*, 346 U.S. 427 (1953), a decision that, as this Court noted, has since been overruled. *Hall Street*, 128 S.Ct. at 1403. Petitioner Hall Street Associates seized upon *dicta* in *Wilko* that arbitrators' interpretations of the

law, "'in contrast to manifest disregard [of the law] are not subject . . . to judicial review for error in interpretation.'" *Id.* (*citing Wilko*, 346 U.S. at 436-37). Hall Street Associates pointed out that lower courts interpreted this language as providing a basis independent of the grounds set forth in § 10 on which an arbitration award could be vacated, arguing that if judges had the power to expand judicial review beyond the categories listed in § 10, private parties should be similarly free to do so. "Hall Street [Associates] sees this supposed addition to § 10 as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties." *Id.*

This Court rejected petitioner Hall Street Associates' arguments, noting that the language relied upon in *Wilko* was at best vague *dicta*. While acknowledging that "some Circuits" had read *Wilko* as providing for review for "manifest disregard" as a ground for vacatur on top of those listed in § 10, this Court refused to endorse a "supposed judicial expansion" in the statutory grounds for judicial review. *Id.* at 1403-04.

Similarly, petitioners here seek modification of an arbitration award subject to the FAA on grounds not itemized in FAA § 11. This Court's decision in *Hall Street* makes clear that this is impermissible as a matter of law. Alleged "manifest disregard" of the law by the arbitrators is not a ground enumerated in § 11 for modifying an arbitration award, and this Court has made clear that the enumerated grounds are *exclusive*. Given that petitioners do not even contend that they have met the statutory grounds enumerated in FAA § 11, they have demonstrated no basis for their petition for a writ of *certiorari*.

### B. This Court's *Dicta* in *Hall Street* that Parties May Seek Enforcement of Arbitration Awards Under a State's Statutory or Common Law Has No Application to this Case

Petitioners seek to avoid the constraints of FAA § 11, as well as this Court's unequivocal statement that the narrow grounds enumerated in § 11 provide the exclusive grounds for modification of an arbitration award, through reliance on the Court's *dicta* in *Hall Street* that in a proper case, parties might provide for enforcement of an arbitration award under state statutory or common law.

> In holding that §§ 10 and 11 provide the exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious juridical review under §§ 9, 10 and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.

*Hall Street*, 128 S.Ct at 1406.

But this is not such a case and never has been. There is no question but that this case is governed by the FAA,[2] and petitioners have never advanced an argument to the contrary until now. Respondents moved to compel arbitration under the FAA, the district court ordered arbitration under the FAA, the award was confirmed under the FAA, petitioners appealed under the FAA, and the Sixth Circuit affirmed under the FAA. Even now, as petitioners assert that review for manifest disregard is necessary to effectuate the parties' choice of Michigan

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2. Section 2 of the FAA makes arbitration provisions in any contract evidencing a transaction "involving commerce" enforceable. This Court has interpreted the term "'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (citing *Allied-Bruce Terminix Cos.*, 513 U.S. 265, 273-74 (1995)). Thus, "the FAA encompasses a wider range of transactions than those actually 'in commerce'—that is, 'within the flow of interstate commerce[.]'" *Id.* The IGAs between Mercy Hospital and each of the Petitioners called for them to relocate and establish medical practices in St. Clair County, Michigan to fill Mercy Hospital's need to provide neurosurgical and pediatric services in its service area. The IGAs required each Petitioner to be a participant for reimbursement purposes in Medicare and Medicaid and other third party payors and managed health plans. (J.A. 58-62, 87-91.) The IGAs plainly "involved commerce," and Petitioners have never advanced a claim to the contrary. *Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 285 n. 3 (M.D.N.C. 2005) (holding FAA governed arbitration agreement because the medical treatment services offered was part of an economic activity, in the aggregate, which involved interstate commerce) (*citing Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (holding the effect of a particular type of activity on commerce should be considered in the aggregate)).

substantive law to questions regarding the "validity and interpretation" of the underlying contract, they do so based on the assertion that this case presents questions arising under the FAA. Pet. for Cert. App. 12.

Petitioners have no basis whatsoever to contend that review of the arbitration award is proper under any standard other than the FAA, and this Court's *dicta* in *Hall Street* that parties might seek enforcement of an arbitration award under a state statutory or common law scheme has no application to this case. As shown below, the governing standard for modification under the FAA does not allow for review for manifest disregard. The Sixth Circuit's decision was correct, and petitioners have demonstrated no grounds for seeking *certiorari*.

### C. The Generic Choice of Law Provision in the Parties' Underlying Contract Neither Constituted a "Restricted" Submission to the Arbitrators Nor Supplanted the FAA Substantive Law Governing a Court's Review of the Arbitration Award

Petitioners' argument that the arbitration award can be modified—actually, doubled—due to the arbitration panel's alleged manifest disregard of Michigan law is based on their fundamental confusion regarding two separate and independent issues: the substantive law that applies to disputes arising out of the parties' contract and the substantive law that applies to modification of arbitration awards. That the former is governed by Michigan law is undisputed. The latter, however, is governed by the federal substantive law

developed under the FAA, which does not permit modification based on alleged manifest disregard of the law.

Arguing that alleged manifest disregard of the law permits modification of arbitration awards, petitioners rely on the well-worn *dicta* in *Wilko v. Swan*, 346 U.S. 427 (1953), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which stated that "in *unrestricted* submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in federal courts, to judicial review for error in interpretation." *Wilko*, 346 U.S. at 436-37 (emphasis added). Petitioners contend that this language creates a basis apart from the grounds enumerated in FAA § 11 to modify an arbitration award. They assert that the manifest disregard standard applies with even greater force because the parties included a generic choice of law provision in their underlying contract which transformed their agreement to arbitrate "any disputes involving the interpretation, breach or enforcement" of the contract into a supposed "restricted" submission to the arbitrators. According to petitioners, if manifest disregard is an available basis on which to review an arbitration award in an "unrestricted" submission, it is even more justified in a restricted submission.

The one-sentence generic choice-of-law provision contained in the parties' contract is simply too slender a reed to support the weight of petitioners' contention. As an initial matter, inclusion of a generic choice of law provision in a commercial contract that also contains an

arbitration provision does not transform the arbitration agreement into a "restricted" submission to arbitration. As the Third Circuit has observed, choice-of-law clauses "are ubiquitous in commercial agreements" for the simple reason that contract law is "mostly state law and it varies from state to state." *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001). A choice-of-law provision simply does not transform the arbitration agreement into a "restricted" submission to arbitration. This point is no clearer than in the *Wilko* case itself, a case in which this Court characterized the arbitration as an "unrestricted submission." In *Wilko*, however, the parties included *two* choice-of-law provisions, one calling for application of New York law to the arbitration, and another calling for application of federal securities law to the underlying transactions. *Wilko*, 346 U.S. at 432 n.15; 434 n. 18. These two choice-of-law provisions were plainly insufficient in this Court's eyes to characterize arbitration under the agreement as a "restricted" submission.

Both this Court and the courts of appeals that have considered the issue have concluded that a generic choice of law provision does not supplant the standard of review applicable to an arbitration award under the FAA. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the parties entered into a contract that contained an arbitration provision stating that controversies "shall be settled by arbitration" in accordance with the rules of the National Association of Securities Dealers, and a choice of law provision stating that the contract "shall be governed by the laws of the State of New York." While the FAA, along with the NASD rules, permit arbitrators to award punitive

damages, New York law does not. This Court held that the contract's choice-of-law provision meant only that the substantive law of New York would apply to the dispute, but not New York's special rules limiting the authority of the arbitrators. "Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration[.]" *Mastrobuono*, 514 U.S. at 64.

The courts of appeals that have considered the issue have similarly concluded that a generic choice-of-law provision contained in a contract that also calls for arbitration of disputes does not displace the FAA's standard of review. In *Jacada v. International Marketing Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005), for example, the court held that a generic choice-of-law provision that stated that the parties' agreement "will be governed by the laws of the state of Michigan" did not displace the federal standard for vacating an arbitration award. In so holding, the Sixth Circuit relied on this Court's directive that due regard be given not only to the federal policy favoring arbitrability, but also the federal policy favoring arbitrator discretion.

> This federal policy favoring protection of arbitrator authority is implicated by standards of vacatur. While we hesitate to characterize Michigan's standard for vacatur as a "special rule," applying that standard instead of the more liberal federal standard limits the authority of arbitrators by applying greater judicial scrutiny to their decisions. We

> must therefore interpret the present agreement giving due regard to this policy.

*Jacada*, 401 F.3d at 711. Citing *Mastrobuono*, the Sixth Circuit held that the choice-of-law provision covered the rights and duties of the parties, but that the arbitration clause covered judicial review of the arbitration award. *Jacada*, 401 F.3d at 711; *accord Fidelity Federal Bank, FSB v. Durga MA Corp.*, 386 F.3d 1306, 1311-12 (9th Cir. 2004); *Action Ind., Inc. v. U.S. Fidelity & Guaranty Co.*, 358 F.3d 337, 342-43 (5th Cir. 2004); *Roadway Package Sys.*, 257 F.3d at 293-98 (3d Cir. 2001); *UHC Management Co., Inc., v. Computer Sciences Corp.*, 148 F.3d 992, 995-98 (8th Cir. 1998).[3]

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3. *See also, Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 965-66 (10th Cir. 2001) (federal law applied to vacatur rather than state law, despite choice-of-law provision requiring application of state law to agreement), *rev'd on other grounds*, 537 U.S. 79 (2002); *Gallus Investments, L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 233 (4th Cir. 1998) (choice-of-law provision did not require application of state evidentiary standards to arbitration proceedings; vacatur governed by federal law); *National Union Fire Ins. Co. of Pittsburgh v. Belco Petroleum Co.*, 88 F.3d 133, 134-35 (2d Cir. 1996) (federal law, not state law, applied to question regarding preclusive effect of prior arbitration award, despite inclusion of choice-of-law provision requiring application of state law to issues concerning the construction, validity and performance of the insurance policy at issue); *PaineWebber, Inc. v. Elahi*, 87 F.3d 589, 594 (1st Cir. 1996) (federal law, not state law, governed whether arbitrator or court decided whether arbitration demand was timely, despite inclusion of a choice-of-law provision requiring application of state law to the construction and enforcement of the agreement); *Gingiss International, Inc. v. Bormet*, 58 F.3d 328, 332-33 (7th Cir. 1995) (state law requiring notice of arbitration proceeding inapplicable despite generic choice-of-law provision); *Schooley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 107 F.3d 21 (10th Cir. 1997) (FAA applied despite choice-of-law provision requiring application of Oklahoma law).

In sum, the generic choice-of-law provision in the underlying contract does not displace the federal substantive law that governs review of the arbitration award, does not transform the arbitration into a so-called "restricted submission," and provides no basis whatsoever for expanding on the exclusive and limited grounds enumerated in FAA § 11 for modifying arbitration awards.

### D. Petitioners' Persistent Efforts to Seek Modification of the Arbitration Award are Contrary to the National Policy Favoring Arbitration

In *Hall Street*, this Court recognized that expanding the detailed categories in §§ 10 and 11 for review of arbitration awards would "rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility." *Hall Street*, 128 S.Ct. at 1405. This Court therefore concluded that FAA §§ 9-11 substantiate a "national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to more cumbersome and time-consuming judicial review process,' and bring arbitration theory to grief in post-arbitration process." *Id.* (internal citation omitted).

Petitioners' contention that reviewing courts should be permitted to modify arbitration awards based on the arbitrators' claimed manifest disregard of the law would defeat the purposes of the FAA as articulated by this

Court and irreparably damage the finality of arbitration awards. The instant case serves as a ready example. Here, the arbitrators carefully considered nearly 100 pages of briefs on the issue of attorney fees and costs, and hundreds of pages of exhibits. The arbitrators carefully considered the parties' competing arguments on the issues presented and entered an award based on a painstaking analysis of the law. The arbitrators' meticulous findings and calculations are entitled to finality.

## III. THERE IS NO CIRCUIT CONFLICT CONCERNING THE PROPER STANDARD FOR MODIFYING AN ARBITRATION AWARD THAT JUSTIFIES GRANTING THE PETITION FOR *CERTIORARI*

This Court made clear in *Hall Street* that FAA §§ 10 and 11 provide the exclusive grounds on which a court may vacate or modify an arbitration award. The Court said so not just once but five times in its short and decisive opinion. *Hall Street*, 128 S.Ct. at 1400, 1401, 1403, 1404, 1406. "We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification." *Id.* at 1403. There can be no question but that *Hall Street* states the principle governing this case.

Petitioners cite no post-*Hall Street* cases addressing whether alleged manifest disregard of the law is a basis on which a court may modify an arbitration award. Other than the Sixth Circuit's decision in this case, there is none. There is no circuit conflict to resolve.

Instead petitioners engage in a legal sleight of hand to create a circuit conflict where there is none. Petitioners cite two cases from the Second Circuit as "recognize[ing] manifest disregard of the law as a judicially-created ground for modifying an arbitration award." Pet. for Cert. at 22. But the Second Circuit's reference to manifest disregard as a basis to modify an arbitration award was at best *dicta* in each of the cases cited, and has been repudiated by the Second Circuit in light of *Hall Street*.

The principal case cited by petitioners is *DiRussa v. Dean Witter Reynnolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1998),[4] a case decided ten years prior to *Hall Street*, where the plaintiff sought modification of an arbitration award arguing that the arbitrator had manifestly disregarded the law by failing to include attorney fees in his monetary award. In *dicta*, the court referred to manifest disregard as a "judicially-created" ground for modifying or vacating an arbitration award, but found that the plaintiff could not meet the exacting manifest disregard standard. *DiRussa*, 121 F.3d at 822-23.

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4. The second case cited by Petitioners is *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), where the question before the court was whether the award should be vacated. The court's reference to modification is simply *dicta*. *Halligan*, 148 F.3d at 202. Petitioners also cite *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702 (D.C.Cir. 2001) as an example of another circuit that recognizes manifest disregard as a basis on which to modify an arbitration award. (Pet. at 23 n.17.) But *LaPrade* was decided on cross motions to confirm or vacate the award, and there is no indication in the opinion that application of the manifest disregard standard was challenged by the party opposing vacatur. In any event, the court held that the plaintiff did not demonstrate that the panel had manifestly disregarded the law.

Petitioners do not disclose that the Second Circuit has repudiated *DiRussa*, holding that its reference to manifest disregard as a separate "judicially-created" ground on which an arbitration award could be disturbed is "undeniably inconsistent" with this Court's decision in *Hall Street. Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 548 F.3d 85, 94 (2d Cir. 2008).

In *Stolt-Nielsen*, the Second Circuit discussed whether "manifest disregard" survives *Hall Street* as a basis on which to vacate an arbitration award. As the Second Circuit noted, the courts of appeals that have addressed this issue have concluded either that manifest disregard simply does not survive *Hall Street* as a basis to vacate an arbitration award, or that it is judicial shorthand for the grounds enumerated in FAA § 10 for vacating an award. *Stolt-Nielsen*, 548 F.3d at 94 (collecting cases). The Second Circuit opted to follow the latter approach, holding that "manifest disregard" is a "judicial gloss" or shorthand for the grounds set forth in FAA § 10(a)(4). Thus, manifest disregard exists when the arbitrators "'exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.'" *Id.* at 95 (*quoting* FAA § 10(a)(4)).

The Second Circuit's analysis of manifest disregard simply is not in conflict with the Sixth Circuit's decision in this case. Under the Second Circuit's approach in *Stolt-Nielsen*, alleged manifest disregard serves only as a judicial shorthand for the grounds enumerated in the FAA. The Sixth Circuit's decision below specifically considered this possible interpretation of the post-*Hall*

*Street* status of manifest disregard, expressly concluding that it provided petitioners no assistance in this case:

> To the extent that "manifest disregard" is "shorthand" for the grounds enumerated in § 11, as the Supreme Court suggested might be the case for some of the grounds listed in § 10, *id.* at 1404, that does Grain and Barnes no good. As we have shown, the enumerated grounds upon which they rely simply do not apply to their merits-based complaints about the award.

Pet. App. 9a (*citing Hall Street*, 128 S.Ct. at 1406).

In sum, there is no circuit court conflict to resolve in this case, and petitioners have presented no basis on which their petition should be granted.

## IV. PETITIONERS FAILED TO ESTABLISH THAT THE ARBITRATORS MANIFESTLY DISREGARDED THE LAW

Finally, petitioners' claims of alleged manifest disregard are meritless in any event, as the district court found. The manifest disregard standard as developed prior to *Hall Street* is extremely narrow.

> An arbitration decision 'must fly in the face of established legal precedent' for us to find manifest disregard of the law. . . . If a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. **Only where no judge or group**

**of judges could conceivably come to the same determination as the arbitrators must the award be set aside.**

*Electronic Data Systems Corp. v. Donelson*, 473 F.3d 684, 691 (6th Cir. 2007) (internal citations omitted; emphasis supplied). As the Second Circuit has stated, an arbitration award "'should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached.'" *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) (*quoting Banco de Seguros del Estado*, 344 F.3d 255, 260 (2d Cir. 2003)). Petitioners simply cannot establish that the arbitrators manifestly disregarded the law in crafting their unanimous award.

Significantly, of the three purported errors petitioners point to as evidence of supposed manifest disregard of the law, two issues concern the amount of interest awarded by the arbitration panel. But petitioners never even requested an award of interest from the arbitrators and did not brief the issue in the memoranda of law they submitted to the arbitrators. Moreover, the arbitration clause in the IGAs required that arbitration proceed in accordance with the rules of the American Arbitration Association. The AAA rule governing interest states that "[t]he award of the arbitrator(s) *may* include . . . *interest at such rate and from such date as the arbitrator(s) may deem appropriate*[.]" Commercial Arbitration Rules, R-43(d)(I) (2005) (emphasis added). The arbitration panel was authorized to award whatever (or no) interest it deemed appropriate. Petitioners have no basis to contend that the arbitrators manifestly disregarded law

that was not presented to them and which was supplanted by the AAA rule on interest in any event.[5]

Petitioners fare no better with their third instance of supposed disregard of the law. Petitioners claim that because Dr. Grain prevailed on two of the four claims that he arbitrated, he was entitled to all of his attorney fees and costs, rather than the portion of the fees and costs attributable to only the claims on which he actually prevailed. This argument, presented to and rejected by the arbitration panel, flies in the face of established law that Michigan's Rule of Professional Conduct 1.5 is imported into every fee agreement in Michigan,[6] that

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5. *See e.g.*, *Pri-fit Worldwide Fitness, Inc. v. Flanders Corp.*, No. 2:00CV0985, 2006 WL 1073556 at *4 (D. Utah 2006) (denying modification of arbitration award based on allegedly erroneous award of interest; "Those who choose to resolve a dispute by arbitration can expect no more than they have agreed.") (*quoting Jeppsen v. Piper, Jeffray & Hopwood Inc.*, 879 F.Supp. 1130, 1137 (D. Utah 1995)).

6. MRPC 1.5 states that a "lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Under Rule 1.5, a fee is excessive when it is in excess of a "reasonable fee." MRPC 1.5. Thus, a reasonableness standard is imported into any fee agreement and into any fee petition. Notwithstanding the IGAs' reference to "actual attorney fees," it is clear that fee awards must be consistent with the MRPC 1.5 prohibiting excessive fees. *See Redfern v. R.E. Dailey & Co.*, 146 Mich. App. 8, 21-22 (1986) ("[a]lthough we have construed the parties' indemnity agreement to include attorney fees, we will stop short of a construction condoning unreasonable attorney fees. See Code of Professional Responsibility, DR 2-106 [the precursor to MRPC 1.5].") *See, Papo v Anglo Restaurants of San Jose, Inc.*, 149 Mich. App. 285, 299 (1986) ("when a contract specifies that a breaching party is required to pay the other side's attorney fees, only reasonable, not actual, attorney fees should be awarded.").

MRPC 1.5 prohibits excessive fees, that fees must be reviewed for reasonableness in light of "the amount involved and the results obtained."[7] MRPC 1.5(a)(4).

Petitioners sought $3,651,894 in attorney fees and costs in connection with damage claims totaling over $10 million. The arbitration panel awarded Dr. Barnes nothing on her claims and awarded Dr. Grain 5% of the amount he sought. The arbitration panel followed Michigan law and reached the correct result in apportioning the fees and costs to the parties based upon "the amount involved and the results obtained."

There was plainly no manifest disregard of the law. It is time, once and for all, to close the door on the arbitration award and give it the finality it deserves.

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7. Michigan courts award and deny fees in relation to claims won and claims lost. *See, Schellenberg v. Rochester, Mich. Lodge No. 2225*, 228 Mich. App. 20, 44-48 (1998) (affirming award of 90% of fees due to 90% success); *Collister v. Sunshine Food Stores, Inc.*, 166 Mich. App. 272, 274 (1988) (affirming denial of fees based in part on plaintiff's loss on six out of seven claims); *Kissinger, Inc. v. Singh*, 304 F.Supp.2d 944, 955-56 (W.D. Mich. 2003) (reducing plaintiff's attorney fees and costs by 50% in light of the plaintiff's loss on five out of eleven claims); *Relational Funding Corp. v. TCIM Services, Inc.*, No. 01-821, 2004 WL 1192683 (D.Del. 2004) (applying Michigan law, and holding that the plaintiff's demand for full attorney fees was "plainly unreasonable" in light of its recovery of only 17% of the total amount sought, and awarded only 39% of plaintiff's fees and costs).

## CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the petition. Respondents request that the petition be denied.

Respectfully submitted,

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